80-1995

No. _____

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEAMSTERS LOCAL UNION NO. 115,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the National Labor Relations Board is authorized to issue a bargaining order to remedy an employer's "outrageous" and "pervasive" unfair labor practices which have prevented the Union from attaining majority status.*

*In addition to Local 115 and the National Labor Relations Board, Haddon House Food Products, Inc. and Flavor Delight, Inc. were parties to the proceedings below.

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In The

Supreme Court of the United States

October Term, 1980

No. _____

Teamsters Local Union No. 115,
a/w International Brotherhood of Teamsters, Chauffeurs,
Warehousemen and Helpers of America,

Petitioner,

v.

National Labor Relations Board,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Petitioner, Teamsters Local Union No. 115, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on January 26, 1981, which denied a petition to review an Order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 641 F.2d 984. It is reproduced *infra* in Appendix (hereafter "App.") B1 - B24.

The decision and order of the National Labor Relations Board, dated June 12, 1979, is reported at 242 NLRB No. 180 and is reproduced *infra* (App. C1 - C61).

JURISDICTION

The judgment (App. B1 - B24) of the Court of Appeals was entered on January 26, 1981. The Court of Appeals denied the Union's petition for rehearing (App. A1 - A2) on February 28, 1981. This Court has jurisdiction under 28 USC § 1254 (1).

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act of 1935, as amended (49 Stat 449, 29 USC § 160 (c)), provides, in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act ...

STATEMENT OF THE CASE

A. Facts

Petitioner Teamsters Local Union No. 115 (hereafter "the Union") began organizing the employees of Haddon House Food Products, Inc. and Flavor Delight, Inc. (hereafter the "Company") in November, 1975. On November 13, employees began distributing Union authorization cards in the Company parking lot during the lunch break. A supervisor sitting in his car eating

lunch watched four employees move from car to car soliciting their fellow employees to sign the cards. Later, an employee solicited cards in the plant (App. C24, C37).

Early in the morning of November 15, the Company Vice President met with an employee who, during a previous organizing campaign, had been laid off and recalled on the condition that he avoid the union. The employee denied that he was involved in the current Union campaign and was told that he was safe but that some people would be "leaving" that day (App. C37 - C38).

Almost immediately after this conversation, the Company Vice President began discharging employees who had solicited or signed Union authorization cards. Six employees were "laid off" because of lack of work and the Company's poor financial condition; another was ordered to leave immediately. A seventh employee was laid off because he would not work overtime (App. C26 - C37).

Late that afternoon, the Company President conducted a rare meeting of all employees. He explained that there had been layoffs because of a lack of work. Nevertheless, he told the remaining employees to work longer hours. Finally, he stated that although the Company was in poor financial condition and could ill afford it, he would confer with his accountant and would arrange a wage increase to take effect in two days (App. C38 - C39).

Shortly after noon on November 17, Union agents and two employees met with the Company President to demand recognition and gave the Company President 24 signed authorization cards which he examined. Several times, the Company official mentioned that a card signer was no longer employed. After looking at the cards for several minutes, he said that the Union did not represent a majority of his employees. When he stated that the Company had about 40 employees, a Union organizer responded that the Union had more than half that number. Another company official entered the office, looked at the cards and left to call a lawyer. The Union was advised to contact the Company's attorney (App. C46).

The seven discharged employees began picketing on November 18 at the Company. After work that afternoon, other employees joined the pickets. On the next day, November 19, still others began picketing.

The Company immediately sent a series of form letters to the employees who joined the picket line. The first letter indicated that they were suspended as of November 19, that they would be replaced and that they would be put on "the lowest priority list to be rehired." Several days later, a "clarification" letter advised the pickets that they would be replaced and put on a preferential hiring list (App. C2 - C5).

The Company threatened and discharged employees who continued to work but who demonstrated friendship with the pickets. An employee was called a "two-faced so-and-so" for driving a picket home for lunch and warned that "If you don't watch it, you'll get yours one of these days." (App. C38). On November 25, the Company fired an office employee for talking to strikers and a Union agent. A Company official told her that if she felt like "agitating," she could leave, and directed another employee to escort her from the building (App. C32 - C34).

Several times during the strike, the Union asked the Company to take the employees back. On or after November 24, discharged employees and their striking supporters received letters rescinding their suspension and asking them to report on December 1. Several employees did not receive the letters until after the December 1 "deadline"; others never received the letters (App. C2 - C5). On December 1, the Company informed the Union that it had written everyone and was recalling "everyone." The Union agreed to notify the employees. The next day the strikers met and agreed to return to work on December 4, and the Union so informed the Company (App. C2 - C5).

On December 4, the strikers appeared at the plant, ready to return to work. They were met by police with guard dogs who precluded their return. The Company told the Union that its lawyer had advised against reinstating anyone who missed the December 1 "deadline" specified in the letters. The employees then resumed picketing (App. C2 - C5).

B. The Board's Decision and Order

The Board concluded that the Company had violated Section 8(a)(3) and (1) of the Act by discharging eight employees because of their Union activity and by refusing to reinstate the unfair labor practice strikers upon their unconditional request and had violated Section 8(a)(1) by threatening to discharge employees to prevent them from engaging in Union activities, by telling them that their fellow employees had been discharged for Union activities, by promising increased benefits to induce employees to abandon the Union, and by telling employees that they were suspended for striking (App. C1 - C5, C26 - C39).

In addition to the normal remedies, the Law Judge concluded that a bargaining order was necessary to remedy the Company's "outrageous and pervasive" unfair labor practices even though the Union had never represented a majority of the Company's employees (App. C57 - C58). The Law Judge found that the Union had signed authorization cards from 27 of the 59 employees in the bargaining unit (App. C52).

The Board declined to impose the proposed bargaining order, because the Union had authorization cards from only 27 of a maximum of 56 bargaining unit employees (App. C5 - C6, n.7). Members Murphy and Truesdale assumed that the Board has authority to issue a bargaining order despite a union's failure to attain majority status, but held that the violations here, while "outrageous" and "pervasive" did not merit a bargaining order (App. C5 - C6). Chairman Fanning and Member Truesdale held that the Board had the authority and should exercise it on these facts (App. C14 - C20). Member Penello held that the Board had no authority to issue a bargaining order where the union had never attained majority support (App. C21). However, the Board *sua sponte* imposed a number of "extraordinary" remedies. It ordered the Company to mail a notice to all employees and to publish copies of the notice in local newspapers of general circulation; to conduct in-plant meetings at which the Company President would read the notice to employees; to give the Union a list of all employees for one year; to give the Union access to plant bulletin board for two years; to permit Union representatives in non-work

areas of the plant on non-working time for two years to permit Union representatives to attend any Company meeting concerning Union representation and to have equal time to address the employees; and to permit the Union a 30-minute meeting with employees on working time between two and ten days prior to any election in which the Union participates within two years (App. C6 - C8).

C. The Court of Appeals

Both the Company and the Union sought review of the Board's Order. The Court found that the Union had signed authorization cards from 27 of the 55 or possibly 54 bargaining unit employees (App. B6 - B8 and n.4). The Court of Appeals upheld the Board's refusal to issue a bargaining order and enforced the Board's order except for the requirement that the Company President read the Board's notice to the gathered employees (App. B22 - B24).

On February 28, 1981, the Court denied the Union's Petition for Rehearing (App. C1 - C2).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT ON AN IMPORTANT QUESTION OF FEDERAL LABOR POLICY

This case concerns the meaning of the phrase "affirmative action" in Section 10(c) of the National Labor Relations Act, which directs the Board to fashion remedial orders requiring "such affirmative action ... as will effectuate the policies of this Act." In this provision, Congress directed the Board to remedy proven violations of the Act by restoring the situation, as nearly as possible, to that which *would have obtained but for* the illegal discrimination." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941) (emphasis supplied). *See also NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263 (1969); *Carpenters v. NLRB,* 365 U.S. 651, 657 (1961) (Harlan, J., concurring). Pursuant to Section 10(c), therefore, the

Board must reestablish the situation existing prior to the employer's illegal conduct and project what would have happened had the employer not committed the unfair labor practices.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969), the Supreme Court upheld the Board's statutory authority to issue bargaining orders "to remedy past election damage" and to "deter future misconduct." Specifically, the Court held that a remedial bargaining order was justified where a union had obtained authorization cards from a majority of the employees in an appropriate unit and the employer had then committed extensive, but not pervasive or outrageous, unfair labor practices which had the tendency to undermine the union's majority support and impede the election process. *Id.* at 614. This Court, nevertheless, indicated that proof of majority status should not always be a prerequisite to the issuance of a bargaining order. Agreeing with the Fourth Circuit, this Court

> left open the possibility of imposing a bargaining order without the need of inquiry into majority status on the basis of cards or otherwise, in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for these practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by application of traditional remedies, with the result that a fair and reliable election cannot be had." *NLRB v. S.S. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967).

Id. at 613-614

In *United Dairy Farmers Cooperative Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980), the Third Circuit interpreted *Gissel* to permit "the Board in exceptional cases ... to issue bargaining orders even where there is no showing that the union at one point had a card majority." Despite the acknowledged superiority of the Board's election processes, the Third Circuit nevertheless reasoned that severe unfair labor practices can destroy the potential for a free

and uncoerced election in the "immediate future." *Id.* at 1067. In such cases, the Board has the authority to issue a remedial bargaining order. To conclude otherwise, the Third Circuit stated,

> would undermine the underlying goal of the Act to further the majority preference of all employees. Unions which would have attained a majority in a free and uncoerced election if the employer had not committed unfair labor practices would be deprived of recognition merely because of the employer's illegal conduct.

Id. at 1068. The Third Circuit therefore directed the Board to consider on remand the propriety of a bargaining order on the facts of the case. *Id.* at 1069-1070. The Board has accepted the remand in *United Dairy Farmers.*

The Third Circuit's analysis of *Gissel* has been widely accepted by the courts and by commentators. In *J.P. Stevens & Co., Inc. Gulistan Div. v. NLRB,* 441 F.2d 514, 521-522 (5th Cir. 1971), the Fifth Circuit stated that "the present proceedings constitute one of those 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices which, under *Gissel,* justify the issuance of a bargaining order despite the absence at one time of the Union-demonstrated majority."[1] *See also NLRB v. Empire Corp.,* 518 F.2d 860, 863, n. 3 (6th Cir. 1975); *NLRB v. Pilgrim Foods, Inc.* 591 F.2d 110, 119 (1st Cir. 1978); *NLRB v. Kaiser Agricultural Chemicals,* 473 F.2d 374, 382 (5th Cir. 1973); *Arbie Mineral Feed Co. v. NLRB,* 438 F.2d 940, 943 (8th Cir. 1971); *NLRB v. Okla-Inn,* 488 F.2d 498, 508 (10th Cir. 1973). Professor Bok, whose analysis of representation election campaigns received great deference in *Gissel,* endorsed the concept of a remedial,

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1. Although the Fifth Circuit also found that the union had once obtained majority support, the court's analysis of *Gissel* was not dicta, for where an appellate court decision rests on two or more grounds, neither can be relegated to the category of dictum. *Woods v. Interstate Realty Co.,* 337 U.S. 535, 537 (1949). *See also: Gabbs Exploration Co. v. Udall,* 315 F.2d 37, 39 (D.C. Cir. 1963), *cert. denied,* 375 U.S. 822.

non-majority bargaining order. Bok, *The Regulation of Campaign Tactics in Representation Election Under the N.L.R.A.*, 78 HARV. L. REV. 38, 133-139 (1964). So does a former Board member. Walther and Douglass, *NLRB Bargaining Orders: A Problem-Solving or Ivory Tower Approach to Labor Law*, 17 WASHBURN L. J. 1, 9-10, 22 (1977). *See also:* Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union has Never Attained a Majority*, 29 LAB L. J. 631 (1978); Comment, United Dairy Farmers Cooperative Association: *NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority*, 80 COLUM. L. REV. 840 (1980).

In contrast, the District of Columbia Circuit affirmed the Board's refusal to issue a bargaining order. Although conceding that there may be "no rational expectation that a fair election among the employees can possibly take place in the foreseeable future" (App. B8) and that "the Employer's conduct may have so poisoned the well that traditional democratic processes of election and designation by authorization cards are no longer viable options" (App. B8), the District of Columbia Circuit nevertheless observed that the Board had never before issued a bargaining order absent evidence of a union majority (App. B8) and indicated that it was "not prepared" to reach the important question in this case (App. B10). The court's decision was based, in large part, upon its prediction that Board Member Penello, who had cast the decisive vote against the issuance of the order because of his interpretation of Section 10(c), would still oppose the issuance of such an order on policy grounds even if his legal position were found erroneous (App. B11).

The District of Columbia Circuit's speculation concerning Member Penello's vote on remand was improper.[2] *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). In *Phelps Dodge Corp. v.*

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2. The court's speculation was also irrelevant. As the Union explained in its Petition for Rehearing, Member Penello had resigned from the Board effective January 14, 1981, almost two weeks before the circuit court issued its opinion. On January 26, 1981, the entire Board "majority" of members Murphy, Truesdale and Penello had resigned. A remand could not have been futile, as the court suggested.

NLRB, supra, 313 U.S. at 197-200, this Court held that where the Board improperly disclaimed its authority to issue specific relief, the appropriate judicial response was a remand so that the Board could determine for itself the propriety of the remedy on the facts of the case. Accord: *NLRB v. Food Store Employees,* 417 U.S. 1, 9-10 (1974).

The court's opinion below is also inconsistent with other decisions in the District of Columbia Circuit, for the court refused to apply a balancing test which predated *Gissel.* In *Local 57, ILGWU v. NLRB [Garwin Corp.],* 374 F.2d 295 (D.C. Cir. 1967), *cert. denied,* 387 U.S. 942, the court employed this balancing test to deny enforcement of a bargaining order. An employer had moved from New York to Florida to avoid bargaining with a union representing the New York employees. The Board did not order the employer to reopen the New York operation, but instead ordered the employer to bargain with the union in New York, if it reopened there, or in Florida irrespective of whether the union achieved majority status in Florida. This remedy, said the court, infringed upon the Florida employees' Section 7 rights to reject union representation, in violation of one of the Act's most basic policies. Nevertheless, wrote Judge, now Chief Justice, Burger,

> Such an infringement of the Florida employees' Section 7 rights might be justified if some rights of the New York workers depended on the balancing or if for some other valid reason the Board considered it necessary to promote industrial peace.
>
> . . . . . .
>
> Were the Board engaging in a genuine balancing of the rights of newly hired workers against those of the discriminatees whose places they took, we would allow it very wide scope. (*Id.* at 301-302) (footnotes omitted).

After *Gissel,* the District of Columbia Circuit accepted the prevailing view that the Board could issue a bargaining order "without

need of inquiry into the question of majority status" in an appropriate case. *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434, 441, n.20, (1972); *Amalgamated Clothing Workers v. NLRB [Jimmy-Richard Co.]*, 527 F.2d 803, 808, (1975), *cert. denied*, 426 U.S. 907. Indeed, even *after Haddon House*, the District of Columbia Circuit reiterated that *Gissel* "left open the possibility that a bargaining order could issue without need of inquiry into union's majority status." *Pedro's, Inc. v. NLRB*, ____ F.2d ____, ____, 107 LRRM 2023, 2027 (D.C. Cir. 1981).

The decision by the District of Columbia Circuit fails to give due consideration to either the Section 7 rights of the employees who were the victims of the employer's "outrageous" and "pervasive" conduct or to this Court's interpretation of Section 10(c) in *Gissel*. It can fairly be said that, notwithstanding the other remedies imposed by the Board, the final result in *Haddon House* is that the employees' expressed desire for Union representation has been thwarted. The employer has been allowed to profit from its illegal conduct, thus encouraging other employers to repudiate the principles underlying the Act. Nor does the *Haddon House* decision in anyway contribute to the resolution of the issue of non-majority bargaining orders, as to which the circuits and even the Board seem to be in a quandary.

Finally, the court's interpretation of the "affirmative action" language in Section 10(c) is inconsistent with this Court's reading of similar language in other federal remedial statutes. The broad scope of "affirmative action" required by Section 10(c) and the necessary balancing test is best illustrated in Title VII cases, for the remedial authority granted the federal judiciary in 42 USC § 2000e-5(g) was modeled after Section 10(c). *Teamsters v. United States*, 431 U.S. 324, 366 (1977). There, this Court held that district courts must determine the "rightful place" of victims of discrimination, a task necessarily involving "a degree of approximation and imprecision." *Id.* at 372. More significantly, as here, a district court must face "the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing." *Id.* at 372. The affirmative action necessary to remedy discrimination may permissibly

cause what, absent the discrimination, would otherwise be temporary "reverse discrimination." *Steelworkers v. Weber*, 443 U.S. 193 (1979); *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

Certiorari is necessary to resolve the conflict between the Third and District of Columbia Circuits and within the latter circuit concerning this major question of federal labor policy left unresolved by the *Gissel* Court.

CONCLUSION

For the reasons stated herein, we respectfully urge the Court to grant a Writ of Certiorari in this case.

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Teamsters Local Union No. 115

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1619 **September Term, 1980**

Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner

ARGUED 10-27-80

United States Court of Appeals
for the District of Columbia Circuit

v.

FILED FEB 28 1981

National Labor Relations Board,
Respondent

GEORGE A. FISHER
CLERK

Haddon House Food Products, Inc.
Flavor Delight, Inc.,
Intervenors

BEFORE: Lumbard*, Senior Circuit Judge, United States Court of Appeals for the Second Circuit; Mikva and Ginsburg, Circuit Judges

ORDER

On consideration of the petition for rehearing by Teamsters Local Union No. 115, filed February 9, 1981, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:
George A. Fisher,
Clerk

By:
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1619

TEAMSTERS LOCAL 115, A/W INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

HADDON HOUSE FOOD PRODUCTS, INC. AND FLAVOR DELIGHT, INC., INTERVENORS

No. 79-2018

HADDON HOUSE FOOD PRODUCTS, INC. AND FLAVOR DELIGHT, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEAMSTERS LOCAL UNION NO. 115, INTERVENOR

Petitions for Review of Orders of the National Labor Relations Board

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Argued October 27, 1980

Decided January 26, 1981

Judgment entered this date ←

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Jonathan G. Axelrod, with whom *Hugh J. Beins* was on the brief, for Petitioner in No. 79–1619 and Intervenor in No. 79–2018.

Julius M. Steiner, with whom *Stephen J. Cabot* and *Jerald Cureton* were on the brief, for Petitioners in No. 79–2018 and Intervenors in No. 79–1619.

Anton Hajjar, Attorney, National Labor Relations Board of the Bar of the Supreme Court of Louisiana *pro* hac vice by special leave of Court, with whom *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, were on the brief, for Respondent.

William J. Curtin and *Stephen A. Bokat* were on the brief, for *Amicus Curiae* urging that the Board order should be upheld.

Before: LUMBARD*, *Senior Circuit Judge* for the United States Court of Appeals for the Second Circuit, MIKVA and GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: Haddon House Food Products, Inc., is a small wholesale distributor, owned and managed by one Harold Anderson. Flavor Delight, Inc., is an even smaller spice company, owned and managed by his son, David Anderson. Together, the two companies are the Employer in this proceeding seeking review of an order of the National Labor Relations Board (Board).

On November 13, 1975, Local Union 115 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union) commenced an organization drive among the employees of the Employer. On the following morning, two employees who had been active in the Union drive were summarily fired, as were two other

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

employees who had signed Union authorization cards. Later that same day, three other cardsigners were laid off.

The conflict triggered by these events formed the basis of a complaint issued by the Board's general counsel, charging a number of violations of the National Labor Relations Act (Act). After a hearing, an Administrative Law Judge (ALJ) found that the Employer was guilty of an "outrageous and pervasive" system of unfair labor practices. Although the ALJ found that the Union had never obtained authorization cards from a majority of the employees in the bargaining unit, he nevertheless recommended that the Board issue a bargaining order because the Employer's conduct had been so pervasive and coercive that a fair election could not be held in the foreseeable future. The Board accepted and extended the ALJ's findings of unfair labor practices, but was sharply divided on the bargaining order remedy recommended by the ALJ, and ordered instead a variety of alternative remedies.[1] The Union and the Employer each petitioned for review, and the Board cross-petitioned for enforcement. For reasons set forth in this opinion, we are prepared to enforce the Board's order only if one of the remedies proposed therein is modified.

I. Unfair Labor Practice Findings

There is little dispute that the conduct engaged in by the Employer to abort the Union's organizing effort was egregious and effective. The Employer promised benefits to induce the employees to avoid the Union, and both

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[1] *Haddon House Food Products, Inc.*, 242 N.L.R.B. No. 180, 101 L.R.R.M. 1294 (1979). Members Murphy, Truesdale, and Penello formed a majority in refusing to issue a bargaining order; Members Truesdale and Jenkins and Chairman Fanning formed a majority in favor of the order for which enforcement is sought here. Member Murphy opposed some of the union access remedies imposed, while Member Penello criticized the breadth of the remedial order in general terms.

threatened and carried out discharges and layoffs as a penalty for union activity. After the fired workers began picketing, the Employer initially offered them reinstatement.[2] When they sought to accept the offer, after a few days' delay, the strikers were met by security guards and dogs who denied them entrance to the plant. While the ALJ did not consider the denial of reinstatement an unfair labor practice, the Board did. This is the only unfair labor practice finding challenged on appeal,[3] and we conclude that there was ample evidence in the record to sustain the Board's determination.

Unfair labor practice strikers—those whose absence from the workplace is prompted by employer conduct that is found to constitute an unfair labor practice—are entitled to reinstatement if they make an unconditional offer to return to work. *N.L.R.B. v. International Van Lines*, 409 U.S. 48 (1972). The ALJ found that the strikers' offer was conditional because they had resolved not to return unless they were *all* taken back. The board, however, found that the Employer's reason for denying reinstatement had nothing to do with that condition; indeed, the Employer was unaware of any condition when the employees sought to re-

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[2] The Board found that the Employer had "sent literally a barrage of letters and telegrams to individual discriminatees and to the employees striking in support." Joint Appendix [hereinafter cited as J.A.] 47. The Employer later informed strikers "that their 'suspensions' were rescinded and directed them to report to work by November 28," or, in some cases, December 1. *Id.* Some of these letters were received after the deadline had passed, and others were never received.

[3] The Employer does not appeal from the findings that it unlawfully discharged or laid off seven employees, as mentioned above; that an eighth was fired for merely chatting with the picketers; that two employees were subjected to slightly veiled threats of discharge; and that the company president promised a pay increase in order to quell unionism shortly after the first seven firings.

turn. The Employer denied them reinstatement, the Board found, because they had not met the deadline set in the Employer's offer of reinstatement. Reinstatement conditioned on such a deadline is not the reinstatement to which these employees were entitled under the Act.

The testimony in the record amply supports the Board's finding that the Employer denied reinstatement because its deadline had not been met. And the law amply supports the Board's conclusion that, having denied reinstatement for invalid reasons of its own, the Employer cannot now claim that a subjective resolve of the strikers, never communicated to the Employer, robbed the employees' return of its unconditional nature. The actual basis of the Employer's conduct is determinative. *See, e.g., Lodges 743 & 1756, International Association of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 458 n.61 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976); *Snow v. N.L.R.B.*, 308 F.2d 687 (9th Cir. 1962).

The Board's unfair labor practice rulings were well-founded. Indeed, the record convinces us that the Employer's conduct constituted "a well-orchestrated antiunion campaign that featured repeated and egregious violations . . . of the Act," J.A. 59 (concurring opinion of Chairman Fanning and Member Jenkins). The hard question is how to remedy such conduct in the case at bar.

II. The Minority Status of the Union

Where a union has enjoyed the support of a majority of the employees in the bargaining unit, the Board's remedies for serious employer misconduct frequently include an order directing the employer to bargain with the union. In the instant case, however, the record does not support the Union's contention that it had achieved majority status. The parties agree that the Union had obtained twenty-seven authorization cards signed by employees. The Board found that there were more than fifty-three workers in the

bargaining unit, so that twenty-seven cards cannot demonstrate majority support.

The ALJ had found at least fifty-nine employees in the unit. The Board concluded that the ALJ had counted three employees twice, and so found that there were at least fifty-six employees in the unit. Our own inspection of the record suggests that a fourth employee may have been counted twice.[4] Even so, the Union was at least one card short of majority status.

The Union claims that these figures include three other employees who should have been excluded from the unit because they were supervisors within the meaning of the Act. We turn to that contention.

Section 2(3) of the Act excludes from the statutory definition of employee "any individual employed as a supervisor." 29 U.S.C. §152(3) (1976). Section 2(11) in turn defines supervisor as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1976). This court has reminded litigants that application of this definition requires an attentive eye to the realities of the workplace and not a "wooden reading," since "[a]lmost any employee 'directs' other

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[4] The fourth employee is Albert Romano, *compare* J.A. 31 *with* J.A. 805. The ALJ and the Board were willing to exclude arguendo a number of possible unit members, including alleged supervisor Paul Papp and his daughter Paula. This left the ALJ with 59 employees, J.A. 32, corrected by the Board to 56, J.A. 50 n.7.

employees in some fashion at some time." *Food Store Employees Local 347 v. N.L.R.B.*, 422 F.2d 685, 690 (D.C. Cir. 1969). Moreover, accurate estimation of supervisory status is a factual judgment facilitated by the expertise of the Board, and "[t]he substantial evidence standard for review of agency fact determinations . . . takes on special significance where the issue lies so squarely within the Board's ambit of expertise." *Oil, Chemical and Atomic Workers v. N.L.R.B.*, 445 F.2d 237, 241 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972) (citation omitted).

We begin with the Union's challenge to the Board's finding that Angelo Patelo is not a Flavor Delight supervisor. The record shows that, although he is paid more than some fellow employees, other rank-and-file workers earn more than he does. While he occasionally communicates orders from management, he does not have other supervisory, disciplinary, or hiring powers. He performs manual work side by side with other employees. These are hardly the facts on which the Board's determination can be overturned. The same is true regarding John Morrow, the Employer's oldest employee and one who may have had some authority at some time in the past. Partly because of his age, Morrow has trained another employee, Paul Masi, to take over his major responsibilities. The ALJ concluded that whatever authority Morrow had once exercised was now exercised by Masi, and that such authority did not suffice to make either of these men a supervisor.[5] Finally the Union challenges Michael Diamond as a supervisor; the Board found that, although he may have routed some trucks on occasion, he was essentially serving as a truck driver. In each of these instances, the Board's conclusions on a record of conflicting claims are well within the measure of the substantial evidence test.

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[5] Masi, it may be noted, was a union adherent, and was considered a unit member by the Union, and challenged by the Employer. It all depends on whose supervisor is being gored.

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There is language in one Supreme Court opinion suggesting that the Board's power to fashion remedies might extend to such an order. This dictum appears in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969), where the Court approved the Board's practice of issuing bargaining orders when the majority support of a union, as demonstrated by a showing of authorization cards, had been dissipated by serious unfair labor practices. The Court's discussion of remedial options made reference to three categories: category three included violations not serious enough to warrant a bargaining order because an election could still be held; category two included conduct tending "to undermine majority strength and impede the election processes;" and category one included conduct so "outrageous" and "pervasive" that a fair and reliable election would be impossible. The Court held that the Board could impose a bargaining order in category two cases if a card majority had been shown, and mentioned without apparent disapproval a Fourth Circuit dictum suggesting that bargaining orders in category one cases would not require a majority showing. 395 U.S. at 613–14. Since that time, commentators have hotly debated the extent of the Board's power in category one cases.[6]

As indicated above, the Board has never granted such a bargaining order. The Board Members announced different rationales for their restraint in this case, and the Union focuses on their disagreement as necessitating a remand. Two Members of the Board agreed with the ALJ that a bargaining order was necessary. Two other Members were of the opinion that, while such an order might be appropriate in some circumstances, this was not such a case. Finally, Member Penello did not believe that the Board was ever authorized to issue a bargaining order in favor of a union

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[6]*See, e.g., United Dairy Farmers Cooperative Ass'n. v. N.L.R.B.*, Nos. 78–1800, 78–1801, slip op. at 22–25 (3d Cir. Aug. 6, 1980), and authorities cited.

that had never obtained the adherence of a majority. Since his was the determinative vote, the Union argues that the Board did not fully exercise its judgment, and asks us to remand the case to the Board after holding that Member Penello has been misled by an error of law. This request is, of course, premised on our agreeing that a bargaining order is proper for a minority union in some cases. We are not so sure we agree, and, in any event, are not prepared to fill in the interstices of *Gissel* on the facts of this case.

It is true that Member Penello, in providing the vote necessary to the majority decision on this point, opined that the Board should never order an employer to bargain with a minority union. In stating his views, he referred to his opinion in *United Dairy Farmers Cooperative Association*, 242 N.L.R.B. No. 179, 101 L.R.R.M. 1278 (1979), *remanded*, Nos. 78-1800, 78-1801 (3d Cir. Aug. 6, 1980).[7] In that exposition, he explored the subject at length, emphasizing his belief that the majority rule principle of section 9(a) of the Act was too fundamental to be sacrificed. He insisted that his fellow Members' resolution of the conflict between majority rights and remedial needs was fraught with danger for employee freedom of choice. He claimed that the congressional intent expressed in the stat-

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[7] On review, the Third Circuit, without lengthy discussion of the necessity for a remand, held that the Board *did* have the power to issue bargaining orders to minority unions "if the employer has committed such 'outrageous' and 'pervasive' unfair labor practices that there is no reasonable possibility that a free and uncoerced election could be held." Slip op. at 31. The court reserved judgment on whether the power existed even "when there is no reasonable possibility that the union would have attained an election majority but for the action of the employer," observing that in the present case, "a reasonable possibility exists." *Id.* n.16. We do not share that court's confidence that the Board's authority is so broad, and we are not persuaded that the Board's decision was predicated wholly on the nonexistence of this legal authority.

ute precluded bargaining orders for minority unions and, as his arguments demonstrate, this perceived legislative policy judgment coincided with his own.

In an appropriate case this court may have to confront squarely the dilemma raised by Member Penello. This is not, however, a confrontation to be precipitated hastily, involving as it does the danger of unjustifiably imposing a bargaining representative against the will of the employees. The free choice of the employees is best determined through the inexorable logic of a secret ballot election. The Supreme Court has recognized that "the election process ha[s] acknowledged superiority in ascertaining whether a union has majority support," *Linden Lumber Division v. N.L.R.B.*, 419 U.S. 301, 304 (1974). Where employer misconduct has destroyed the possibility of a free election, the Court has approved the Board's reliance on authorization cards as "the most effective—perhaps the only—way of assuring employee choice," *Gissel*, 395 U.S. at 602. But for a government body to bypass the employees altogether, and impose a bargaining representative merely on the basis of its own assessment of the employees' needs, would pose a serious threat to employee freedom of choice.

We do not believe that such a conundrum should be resolved, even preliminarily, in the abstract. We are being urged to decide this important question merely in order to remand this case to the Board so that Member Penello can restate in slightly different terms the concerns that he has already expressed. We decline to do so. The Board has sufficiently articulated its conclusion that, whether or not this remedy may be justified in some hypothetical situation, a majority of the Board agrees that it is not appropriate in this case.

IV. The Board's Remedial Order

We turn at last to the actual remedies imposed by the Board. The Employer challenges most of these as improper or unnecessary. Before reaching the merits of the Employ-

er's arguments, we must consider whether a procedural obstacle bars the Employer from raising them.

A. *The Procedural Hurdle*

When the Board rejected the ALJ's recommendation of a bargaining order, it substituted an extensive list of alternative remedies. Neither the general counsel nor the Union as charging party had taken exception to the ALJ's failure to impose these remedies. When they finally appeared in the Board decision, the Employer did not petition for reconsideration.

The Board argues that this court is precluded from hearing the Employer's objections, even though these remedies were imposed sua sponte by the Board, because section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. §160(e) (1976). It has been observed that this requirement "affords the Board the opportunity to bring its labor relations expertise to bear on the problem so that [the court] may have the benefit of its opinion when we review its determinations." *N.L.R.B. v. Allied Products Corp.*, 548 F.2d 644, 654 (6th Cir. 1977). And it has been held that mere sua sponte adoption of a remedy does not in itself amount to the "extraordinary circumstances" required by the statute, because reconsideration is available at the Board level. *Id.* at 655.

We think that the plight of this Employer is different, however, because the Employer's objections to Board-designed remedies became entangled with the Union's petition for review of the Board decision and the Board's cross-petition for enforcement. The Board issued its decision on June 12, 1979, and the Union filed its petition for review with this court on June 14. Once the Union's petition was filed, the Board became obligated to file the record with the reviewing court, and that court acquired jurisdiction to en-

force the Board's order. Act §10(f), 29 U.S.C. §160(f) (1976). Once the record was filed, our jurisdiction became exclusive, and the Board no longer had any authority to reconsider its decision without a specific remand from this court.

If an employer is barred from presenting his objections to the reviewing court in such circumstances, then the court faces a Hobson's choice between enforcing the Board order without contest, and remanding the case in its entirety to give the employer an opportunity to make the ritual application for reconsideration. The unfairness of the former course is evident, and the inefficiency of the latter course would prevent the Union from seeking review until the Employer has exhausted his administrative remedies. We do not believe that such a jurisdictional conflict between the court and the Board was intended by Congress, and we find it inconsistent with orderly judicial review. We consider it preferable to hold that, after sua sponte adoption of new remedies by the Board, the filing of a petition for judicial review by another aggrieved party can constitute the extraordinary circumstances that "preven[t] a matter which should have been presented to the Board from having been presented at the proper time." *N.L.R.B. v. Allied Products Corp.*, 548 F.2d at 654. We point out that the Union filed its petition first in this case; our holding is limited to this sequence, and might be different if the Employer had successfully engaged in the all-too-frequent race to the courthouse.

B. *The Board's Remedial Powers*

The Board's choice of remedies is entitled to a high degree of deference. Congress was aware at the time of the Board's creation that the tangled employer-employee disputes arising from the substantive commands of the Act would demand a body with broad remedial powers. Section 10(c) of the Act directs the Board to issue an order requiring guilty parties "to cease and desist from such un-

fair labor practice, and to take such affirmative action including reinstatement . . . as will effectuate the policies of the Act." 29 U.S.C. § 160(c) (1976). With that kind of mandate, it is not surprising that the Supreme Court has consistently stressed that the Board's remedial power "is a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964). In fashioning its remedies, "the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

In the present case, the ALJ concluded that "the unfair labor practices to which this Respondent resorted to kill off the union campaign with finality—violent and outright discharge of seven persons within hours of the birth of the union campaign—were 'so outrageous and pervasive' " that extraordinary measures were needed. J.A. 36. The Board agreed that the violations were "numerous and egregious," J.A. 47, but balked at the bargaining remedy the ALJ had proposed. It then undertook the difficult task of formulating a set of remedies that would restore the employee confidence necessary to permit a free and untrammeled representation decision.

The Board imposed a series of remedial actions, designed to reassure interested parties of their rights and to assist the employees in hearing the Union's side of the story despite the "lingering atmosphere of fear" the Employer had created. J.A. 51. None of these actions are unprecedented; some are quite traditional. Yet, in the circumstances of this case, the efficacy of any one of the remedies standing alone is doubtful. We should not be quick to conclude that the presence of some remedies renders other superfluous. The Supreme Court has directed that the Board's order "not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectu-

ate the policies of the Act.'" *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964) (quoting *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943)).

Nevertheless, the Employer attacks the entire remedial scheme, arguing that it is not J.P. Stevens & Co., and that only a record of hardened recidivism could justify so much affirmative action. But an employer who strikes the first blow hard enough may not need to strike another. The measure of the Board's remedial power cannot depend solely on the length or frequency of the Employer's conduct: the crucial factor is the effect of that conduct on the employees.[8]

Turning to the individual remedial steps ordered, we find that they can be loosely grouped into two classes: access remedies and notice remedies. The access remedies are designed to assist the Union in communicating with the employees, and to assist the employees in hearing the Union's side of the story without fear of retaliation. The notice remedies are intended to inform the employees of their statutory rights and the legal limits on the Employer's conduct, and to reassure them that further violations will not occur. We address each class of remedies in turn.

C. *Access Remedies*

The Board ordered the Employer to grant the Union access to company bulletin boards and other posting places for a two-year period, to make available to the Union a list of the names and addresses of its current employees, to give Union spokesmen reasonable access to nonwork areas

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[8] When this court, in *Textile Workers v. N.L.R.B.*, 475 F.2d 973 (D.C. Cir. 1973), directed the Board to take into account the recidivist history of J.P. Stevens & Co., it was not to punish the employer but to assess the effect on employees of milder remedies in view of a history of obstinate resistance. The case does not support a policy of indulgence toward first offenders.

during nonwork periods, to grant the Union equal time if the Employer convenes its employees for a "captive audience" speech on union representation, and to allow the Union to make one 30-minute preelection speech if there is a Board election involving the Union. The Employer makes two general arguments against this set of remedies. The first is that access remedies of any kind are unwarranted, because the record demonstrates that the Union successfully engaged in direct employee solicitation without interference by the Employer. This argument flies in the face of the Board's findings that the Employer had fired employees for their union activities, warned workers not to associate with union adherents, and fired one employee for chatting with members of the picket line.

The Employer next cites *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and its progeny,[9] as authority for the proposition that the Employer's property rights preclude union access to the property unless there are no other reasonable means of reaching the employees. But none of these cases deal with the *remedial* powers of the Board; they only seek to determine when an employer's denial of access to his property can itself be deemed an unfair labor practice, *see Decaturville Sportswear Co. v. N.L.R.B.*, 406 F.2d 886, 889 (6th Cir. 1969).

Some of these remedies are severe, but they are not new departures. *See, e.g., Oil, Chemical and Atomic Workers v. N.L.R.B.*, 547 F.2d 575 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 966 (1977) (bulletin boards); *Food Store Employees Local 347 v. N.L.R.B.*, 476 F.2d 546 (D.C. Cir. 1973), *rev'd on other grounds*, 417 U.S. 1 (1974) (names and addresses); *Montgomery Ward & Co. v.*

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[9] In addition to *Babcock & Wilcox*, the Employer cites *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539 (1972); *N.L.R.B. v. Tamiment, Inc.*, 451 F.2d 794 (3d Cir. 1971); *Diamond Shamrock Co. v. N.L.R.B.*, 443 F.2d 52 (3d Cir. 1971), and *Hutzler Bros. v. N.L.R.B.*, 105 L.R.R.M. 2473 (4th Cir. 1980).

N.L.R.B., 339 F.2d 889 (6th Cir. 1965) (right to reply to captive audience speech); *N.L.R.B. v. Crown Laundry & Dry Cleaners, Inc.*, 437 F.2d 290 (5th Cir. 1971) (pre-election speech).[10] We cannot say that they constitute "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

D. *Notice Remedies*

The Employer concedes the propriety of requiring posting of copies of the Board's notice at the Employer's premises. But the Employer challenges every other remedial step designed to communicate the contents of that notice to interested parties, and to reassure them that their rights will be respected. The Employer objects to mailing copies of the notice to employees and former employees at their homes, finding it duplicative and punitive. This objection need not detain us long. "An employee who must scan the Board's notice hurriedly while at work, under the scrutiny of others, will not be as able to absorb its meaning and hence to understand his legal rights as one who reads it at home in a more leisurely fashion." *J.P. Stevens & Co. v. N.L.R.B.*, 380 F.2d 292, 304 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967). Even more demanding than the needs of current employees are the needs of the former employees who were the direct victims of the Employer's violations; posting the notice at the plant hardly serves to communicate its contents to them.

The Employer also objects to the requirement that the notice be reprinted in appropriate company publications. Such an order is not an innovation. *See, e.g., N.L.R.B. v.*

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[10] As the Board in this opinion found it "unnecessary to consider *at this time* . . . what might happen if another union intervenes in an election proceeding involving Respondent and Charging Party," J.A. 52 n.11 (emphasis added), we need not analyze the access portions of the order from the point of view of a hypothetical second union.

Weirton Steel Co., 183 F.2d 584 (3d Cir. 1950). The Board deems it necessary to convince the employees that the Employer has adopted an official policy of complying with its legal obligations, and it is certainly within the permissible range of Board options.

The same response must be made to the Employer's objection to the requirement that the Board notice be reprinted in newspapers of general circulation in the vicinity. Neither the concern about unfavorable publicity nor the expense would justify the court in overturning this aspect of the Board order. As the First Circuit has observed,

> The further requirement that the notices be published in all newspapers of general circulation helps insure that all interested persons will receive notice. . . . Moreover, where the violations are flagrant and repeated, the publication order has the salutary effect of neutralizing the frustrating effects of persistent illegal activity by letting in "a warming wind of information and, more important, reassurance."

N.L.R.B. v. Union Nacional de Trabajadores, 540 F.2d 1, 12 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (citations omitted).

A more serious objection raised by the Employer concerns the Board requirement that the Haddon House president, Harold Anderson, personally read a copy of the notice to an assembly of the employees. The Employer urges that such a requirement is degrading and "demonstrates that the Board is intent on its design to humiliate and embarrass the Petitioner." It is true that the Board's powers are limited to remedial, and not punitive, orders. But we do not think that the record justifies any suspicion that the Board has displayed a vindictive animus toward the Employer, and we must view the order as remedial, not punitive, if it can reasonably be said to effectuate the purposes of the Act.

Unlike other circuits, this court has never enforced a Board public reading order. We find it necessary, therefore, to examine in some detail the history of the oral notice requirement. This inquiry leads us to conclude that public reading by management is a permissible remedy, but that the Board has gone too far by singling out Harold Anderson as the individual who must perform the reading.

The Board's original rationale for oral reading by management was to ensure effective communication of the substance of the notice, and these provisions were often justified by employee illiteracy. In the earliest cases, oral notice provisions were enforced without comment. *Jackson Tile Manufacturing Co.*, 122 N.L.R.B. 764 (1958), *enforced*, 272 F.2d 181 (5th Cir. 1959); *Taylor-Colquitt Co.*, 47 N.L.R.B. 225 (1943), *enforced*, 140 F.2d 92 (4th Cir. 1943). But in *N.L.R.B. v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859 (5th Cir. 1966), a court refused to enforce such a provision. In *Laney & Duke*, the ALJ had ordered the employer to read the notice to any employee who requested it, but the Board had expanded this to require a reading to all employees, singly or collectively, whether or not requested. The Fifth Circuit denied enforcement because it considered this remedy "unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act." *Id.* at 869. This decision did not, however, preclude other panels of the Fifth Circuit from enforcing public reading orders where the illiteracy of the employees appeared to require it. *N.L.R.B. v. Bush Hog, Inc.*, 405 F.2d 755 (5th Cir. 1968); *N.L.R.B. v. Texas Electric Cooperatives, Inc.*, 398 F.2d 722 (5th Cir. 1968).

Meanwhile, the Second Circuit developed a compromise device: the Board order was modified to permit reading of the notice by either the employer or a Board representative, at the option of the employer. The court was satisfied that such a reading "still guarantees effective communication of the Board's order to the Company's employees."

J.P. Stevens & Co. v. N.L.R.B., 380 F.2d 292, 305 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967). The Board acquiesced in such a modification in a subsequent case, acknowledging that a public reading by a Board representative sufficed to effectuate the policies of the Act. *Textile Workers v. N.L.R.B.*, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968). Finally, the Board itself adopted the Second Circuit's strategy, including this option in its own orders. *See J.P. Stevens & Co.*, 167 N.L.R.B. 258 & n.2 (1967), *enforced in relevant part*, 406 F.2d 1017 (4th Cir. 1968).

This court, however, has viewed public reading requirements with far more suspicion. In *International Union of Electrical, Radio & Machine Workers v. N.L.R.B.*, 383 F.2d 230, 232-33 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 904 (1968), we rejected a public reading by the employer as "inappropriate to achieve the sought-after goal of dissemination of information concerning employees' rights." The court did acknowledge that a public reading order might be appropriate in some circumstances, but found its disadvantages outweighed the usefulness of "yet a fourth promulgation of the order" in that case. *Id.* at 232. It also rejected the alternative of a reading by a Board representative because that could diminish the Board's apparent neutrality, and "creat[e] a problem more severe than the one it supposedly solves." *Id.* at 233 n.5.

Notwithstanding this court's reluctance, other circuits generally approved the public reading order once the Board representative option became routine. *See J.P. Stevens & Co. v. N.L.R.B.*, 441 F.2d 514 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971); *Marine Welding and Repair Works, Inc. v. N.L.R.B.*, 439 F.2d 395 (8th Cir. 1971); *J.P. Stevens & Co. v. N.L.R.B.*, 406 F.2d 1017 (4th Cir. 1968). The dormant issue of readings by the employer himself was revived, however, when the Board began to advocate public reading of the notice for other purposes. The Fifth Circuit has praised the public reading order as "an

effective but moderate way to let in a warming wind of information and, more important, reassurance," *J.P. Stevens & Co. v. N.L.R.B.*, 417 F.2d 533 (5th Cir. 1969), and it is this reassurance function that the Board has recently emphasized to justify the requirement of a reading by management itself.

In *United Dairy Farmers Cooperative Association*, 242 N.L.R.B. No. 179, 11 n.14, 101 L.R.R.M. 1278, 1281 n.14 (1979), *remanded on other grounds*, Nos. 78-1800, 78-1801 (3d Cir. Aug. 6, 1980), the Board acknowledged judicial doubts about the propriety of such an order, but concluded that the company itself must give its employees "reassurances that this campaign will end." In the present case, the Board also invoked this rationale to justify its order of a public reading without the Board representative option. Given this different function, it is obvious that a reading by a delegate of the Board rather than by management would not be sufficient.[11]

The Board's remedy is admittedly strong medicine. But in the context of the severely chilling environment created by this Employer's unfair labor practices, we cannot say that it was superfluous to the cure. This is not a mere "additional" promulgation of the notice's contents, but rather a deliberate attempt to alleviate the workers' fears about the Employer's intentions. The reading can do little to disrupt the already strained relationship between the Employer and the Union, and it may be of substantial benefit to the employees. Whether or not this hope is realized, we cannot say that the Board was wrong to make an effort in that direction. This court acknowledged in *International Union of Electrical, Radio & Machine Workers* that there were conceivably cases where the need for the remedy

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[11] We also continue to doubt the propriety of having a Board representative perform the reading. *See International Union of Electrical, Radio & Machine Workers v. N.L.R.B.*, 383 F.2d at 233 n.5.

would outweigh its oppressiveness and justify the public reading order. We believe that this is such a case.

One feature of the public reading order is highly unusual, however, and presents a special problem for enforcement by this court. That is the requirement that the notice be read by a specified individual—Harold Anderson, the president and owner of Haddon House. We are aware of only one other case in which the Board singled out a particular individual to perform the reading, and we observe that in the ensuing enforcement action, a procedural obstacle preventing the court from reaching the merits of the employer's challenge.[12] *United Dairy Farmers Cooperative Association*, 242 N.L.R.B. No. 179, 101 L.R.R.M. 1278 (1979), *remanded*, Nos. 78-1800, 78-1801 (3d Cir. Aug. 6, 1980). In *United Dairy Farmers*, the Board emphasized the personal participation of the respondent's president in numerous unfair labor practices. He had

> personally announced that employees would have to become "independent contractors" in order to continue driving for Respondent; threatened to close the plant rather than deal with a union; and interrogated employees concerning their organizational activities. As it is clear that Respondent's unlawful campaign emanated from the top, so, too, must reassurances that this campaign will end come from the top.

242 N.L.R.B. No. 179 at 11 n.14, 101 L.R.R.M. at 1281 n.14. The Board had also found that it was the president who had warned an employee that violence would ensue if

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[12] As in the present case, the remedy was added by the Board sua sponte after it rejected the ALJ's recommendation of a bargaining order. The remedies were not challenged before the Board, and so the court would not permit the employer to attack them on review. The "exceptional circumstances" issue was not discussed, and the court did not specify the order of filing. *United Dairy Farmers Cooperative Ass'n v. N.L.R.B.*, Nos. 78-1800, 78-1801, slip op. at 21 (3d Cir. Aug. 6, 1980).

the union were voted in, and had previously threatened to fire union supporters.

It is unnecessary for us to decide whether the circumstances of the *United Dairy Farmers* case, or any circumstances whatsoever, could justify the startling innovation of a Board reading order directed at a specified individual. For even the justification the Board attempted in *United Dairy Farmers* is absent in this case. The Board did not make a careful analysis of the necessity for Harold Anderson to undertake the reading, and the record suggests no such necessity. Of all the unfair labor practices found by the Board, the only one personally performed by Anderson was his promise of benefits as an inducement to avoid the Union. Although this may accurately be categorized as a "fist inside the velvet glove" violation, it was other members of management who carried out firings, made veiled threats to employees, and warned of the consequences of talking with union adherents. Indeed, the Board's opinion does not indicate any unusual need for Harold Anderson to participate personally in the public reading—the ALJ had not recommended it, and the Board only stated that the employees "will personally be assured by Respondent's highest ranking representative that those rights will be respected." J.A. 53.

It is quite likely that a personal assurance from the chief executive officer of a company will have a marginally greater impact than one coming from some other official of lesser rank. But the negative aspects of the order overwhelm the marginal benefit. Such specificity is uniquely oppressive on the individual singled out, and the lack of particularized need may create the misimpression that the Board is seeking to punish an uncooperative respondent. When the remedial value is as slight as it is in this case, we think that the hardship outweighs the benefit to an extent similar to that condemned in this court's prior decision in *International Union of Electrical, Radio & Machine Workers*. Giving due regard to personal dignity and

the limitations on the Board's discretion, we think such a specific reading order is unjustified. We will enforce this provision of the Board order only if it is modified to require the Employer to "have a responsible officer of Respondent read" the Board notice.[13]

V. *Conclusion*

The Board has long struggled to accommodate the interests of employers and employees while assuring free choice of bargaining representatives. When one side or the other destroys the balance and creates a climate inimical to an untrammeled selection process, Congress intended the Board to exercise broad discretion in fashioning a remedy. The remedies chosen may or may not be sufficient to the task, but the Board is entitled to try all reasonable measures. The boundaries within which the Board may reasonably exercise its discretion will vary with the severity of the conduct and the needs that conduct creates.

We uphold the Board's findings and its decision to withhold a bargaining remedy. We hold that, in the peculiar procedural posture of this case, the Employer is entitled to challenge the Board's remedial choices, but with one exception we uphold those choices as within the bounds of the Board's discretion. On the present record, for the reasons we have explained, we are willing to enforce the public reading requirement, but we conclude that the Board has shown no need for singling out the Employer's president to perform it.

It is so ordered.

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[13] The Board order also requires Harold Anderson to sign the notice personally. That provision raises entirely different issues, and has not been challenged by the Employer. It will be enforced without modification.

APPENDIX C

FJPMT

242 NLRB No. 180

D - 4903
Medford, N.J.

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

HADDON HOUSE FOOD PRODUCTS, INC.
AND FLAVOR DELIGHT, INC.

and Case 4 - CA - 7700

TEAMSTERS LOCAL 115, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA

RECEIVED
June 13, 10:06 AM '79
EASTERN CONFERENCE
OF TEAMSTERS

DECISION AND ORDER

On November 1, 1976, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party, and counsel for the General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the

1. Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362

cont'd

Administrative Law Judge only to the extent consistent herewith.

This Administrative Law Judge found, and we agree, that the Company responded to its employees' organizational activities by engaging in numerous and egregious violations of Section 8(a)(1) and 8(a)(3). The Administrative Law Judge refused to find, however, that Respondent acted unlawfully when it rejected the offers to return to work made by employees on December 4, 1975. We disagree with the Administrative Law Judge with respect to this allegation of the complaint and we find that Respondent violated Section 8(a)(3) and (1) of the Act by refusing the December 4 offers to return to work.

As found by the Administrative Law Judge, the record shows that Respondent sent literally a barrage of letters and telegrams to individual discriminatees and to the employees striking in support of the discriminatees. The record also supports the Administrative Law Judge's characterization of these letters as calculated to confuse employees and to create dissention among them. For example, individuals who were informed at one time that they were or would be suspended were notified later that they were "suspended" only until such time as they chose to return to work. Finally, on November 24 and 28, 1975, by letter and telegram, Respondent notified discriminatees and strikers that their "suspensions" were rescinded and directed them to report to work by November 28 or, in the case of several employees classified as packers, by

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1. cont'd

(3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent moved to disqualify the Administrative Law Judge for bias. The Administrative Law Judge denied the motion, and, thereafter, in its exceptions and brief in support thereof Respondent reiterated its contention with respect to such alleged bias. The Board has carefully considered the record as a whole and finds no basis for finding bias on the part of the Administrative Law Judge.

December 1.[2] On December 1, Union Business Agent Yeoman, seeking to clarify the situation and to determine Respondent's intentions, contacted Berman, the Company's general manager. The credited testimony establishes that Yeoman was specifically told that it was the Company's position that "everyone" would be taken back.

After meeting with Yeoman on the evening of December 2, the strikers voted to return to work. Yeoman notified Berman on December 3 that the picket line was down and people would return to work the next day. However, when the discriminatees and strikers sought entry to the plant on the morning of December 4, they were met by security guards with dogs who barred the access. When Yeoman arrived and demanded an explanation from Berman, he was told that the Company's lawyers had advised against reinstating anyone who had not returned on the date specified in the Company's letter.

In concluding that Respondent's conduct on December 4 did not constitute a violation of Section 8(a)(3), the Administrative Law Judge found that the unfair labor practice strikers (14 in number) had "conditioned their return upon simultaneous reinstatement of their unlawfully discharged fellow workers." In support of this conclusion, the Administrative Law Judge excerpted parts of Yeoman's testimony and that of several strikers which, in the Administrative Law Judge's view, justified a finding that it was the intention of strikers to return all together or not at all, and hence that the offer to return to work was conditional.

We disagree with the Administrative Law Judge's analysis of the record and with the conclusions he has drawn

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2. Although the Company maintained that it sent letters to all employees on the same date, November 24, several striking employees did not receive their letters until after November 28, and other strikers apparently never received their letters.

therefrom. It is critical in this regard to recall that Berman, speaking for the Company, took the position that the Company wanted "everyone" back. One can hardly doubt that this was in fact the Company's position inasmuch as the Company conceded sending out letters to each discriminatee, as well as to those striking in their support, inviting all of them to return to work. Given these circumstances, it is not surprising that Yeoman told employees on December 2 "the Company's intentions were that everybody comes back to work....." What is surprising, however, is the Administrative Law Judge's conclusion that "this statement alone shows the intention of all [striking employees] was that the dischargees were to go back to work also" and hence that the offer to return to work was in some sense "conditional."

We note also the absence of any evidence that a union spokesman or striker made any demand whatsoever on Respondent on December 4 to take back the discriminatees if it wanted the strikers to return to work. In fact, neither Yeoman nor any striker had an opportunity on December 4 to "condition" the application to return to work.[3] Thus, the Company rejected out-of-hand the offer to return, explaining only that there was no work for any of the 22 individuals involved because their offer to return was "untimely."[4] At no time, however, did Respondent allude to any demand by the unfair labor practice strikers that the eight discriminatees be reinstated as a "condition" of their offer

3. Clearly, the appearance of employees *en masse* on December 4 could not be understood to constitute an "everyone or no one" condition on the offer to return to work. Indeed, the Company by its letters on November 24 had invited just such *en masse* return.

4. As pointed out by the Administrative Law Judge, any contention that in the circumstances of this case Respondent was privileged to deny reinstatement to these employees because they failed to report to work on the date specified by the Company in its letters is clearly without merit.

to return.[5] Accordingly, we conclude that the offer to return was unconditional and that Respondent's rejection of the offer violated Section 8(a)(3) and (1) of the Act as alleged in the complaint.[6]

As the only effective remedy for Respondent's unlawful conduct, conduct which he characterized as "outrageous and pervasive," the Administrative Law Judge recommended that Respondent be ordered to bargain with the Union upon request. In so doing, the Administrative Law Judge found that the Union could not demonstrate majority status prior to its demand for recognition and the Respondent's refusal to recognize it,[7] but he concluded nonetheless that a

5. The Administrative Law Judge concluded, correctly in our view and in light of the record evidence, that the Respondent's suggestion that strikers conditioned their return to work on the reinstatement of certain supervisory personnel is totally unfounded.

6. It is instructive to compare the events of this case with those in issue in *Okla-Inn, d/b/a Holiday Inn of Henryetta*, 198 NLRB 410 (1972). There the Board adopted an Administrative Law Judge's conclusion that an employer violated Section 8(a)(3) when it ignored an offer to return to work made by striking employees. Although the employer argued that the offer was ambiguous and conditioned upon reinstatement of an individual who did not enjoy status as a protected striker, the Administrative Law Judge concluded that the burden was on the employer to request clarification if it truly doubted the unconditional nature of the offer. Similarly, in the instant case, if Responsent suspected that the offer to return was conditional it could easily have requested clarification from the Union or from the strikers when they presented themselves at the plant on the morning of December 4. Inasmuch as it failed to do so, it cannot now be heard to complain if any uncertainty is resolved against its interest.

7. The parties stipulated that an appropriate unit was composed of truckdrivers, warehousemen, checkers, pickers, and packers employed at Respondent's Medford, New Jersey, facility, excluding all office clerical personnel, salesmen, guards, and supervisors. The Administrative Law Judge concluded that 27 employees, less than a majority of those included in the unit, had evidenced their allegiance to the Union by signing valid authorization cards. The Charging Party and counsel for the General Counsel have excepted to the Administrative Law Judge's approximation of the number of

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bargaining order should issue inasmuch as anything short of such a remedy "assures the Respondent of continued enjoyment of the fruits of its extreme unfair labor practices."[8]

For the reasons expressed in the majority and concurring opinions in *United Dairy Farmers Cooperative Association*, 242 NLRB No. 179 (1979), we decline to adopt the Administrative Law Judge's recommendation of a bargaining order remedy. However, inasmuch as Respondent's unfair labor practices are such that they are likely to have a continuing coercive effect on the free exercise by employees of their Section 7 rights long after the violations have occurred, we shall require additional remedial action designed to dissipate as much as possible the lingering atmosphere of fear created by Respondent's unlawful conduct and to ensure that if the question of union representation is placed before employees in the future they will be able to voice a free choice. To achieve these ends we shall require Respondent to take the following affirmative steps in addition to

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7. cont'd

individuals included in the unit and to his findings with respect to the placement of certain individuals. We agree that the Administrative Law Judge inadvertently counted three employees - Hurlbut, Evans, and Andrews - twice in arriving at the number of employees in the unit. Hence, we agree with the Charging Party and with the General Counsel that the maximum number of employees in the unit at the critical time did not exceed 56. We find it unnecessary to pass specifically on the Administrative Law Judge's placement of several other individuals. We conclude that the record supports the Administrative Law Judge's finding that the Union failed to achieve a clear majority. Even were we to agree that the Administrative Law Judge improperly placed 1 or 2 individuals in the unit of 56 employees, the Union's claim of majority status on the basis of 27 cards would fail.

8. In recommending a bargaining order, the Administrative Law Judge relied, in part, on our decision in *Steel-Fab, Inc.*, 212 NLRB 363 (1974). The Administrative Law Judge's reliance on *Steel-Fab* is misplaced. That case and its successor, *Trading Port, Inc.*, 219 NLRB 298 (1975), deal with the question of when a bargaining obligation, based on prior showing of majority status, commences.

the nonbargaining order remedies recommended by the Administrative Law Judge:[9] (1) in addition to posting copies of the attached notice marked "Appendix" at its Medford, New Jersey, facility, include it in the appropriate company publications and mail it to each individual employee at his or her home address, including, but not limited to, all employees on the payroll at the time the unfair labor practices were committed; all such notices, both mailed and posted, to be signed personally by Respondent's owner and manager, Harold Anderson, who shall also read the notice to current employees assembled for that purpose (Respondent shall afford the Board a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notice); (2) publish in local newspapers of general circulation a copy of the above notice two times per week for a period of 4 weeks; (3) upon request, grant the Union and its representatives reasonable access to its bulletin boards and all places where notices to employees are customarily posted; (4) upon request, grant the Union reasonable access to its plant in nonwork areas during employees' nonwork time;[10] (5) supply the Union, upon request made within 1 year of the date of this Decision and Order, the names and addresses of its current employees; and (6) give

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9. Similar remedial measures were ordered in *The Loray Corporation*, 184 NLRB 557, 558 (1970), and *J. P. Stevens and Co.*, 157 NLRB 869, 878 (1966), enfd. as modified 380 F.2d 292 (2d Cir. 1967), cert. denied 389 U.S. 1005. See also *H. W. Elson Bottling Company*, 155 NLRB 714 (1965), enfd. as modified 379 F.2d 223 (6th Cir. 1967), cert. denied 390 U.S. 904. See also *United Dairy Farmers Cooperative Association, supra.*

10. Member Murphy does not agree with her colleagues that equal access is an appropriate remedy for the Board to provide here. Accordingly, she would not require Respondent to afford the Union with equal access to the employees on Company time. By doing so her colleagues are forcing Respondent not only to support the Charging Party's campaign but also are raising serious questions as to the validity of any election by limiting equal access only to the Charging Party.

notice of, and equal time and facilities for the Union to respond to, any address made by Respondent to its employees on the question of union representation; (7) afford the Union the right to deliver a 30 minute speech to employees on working time prior to any Board election which may be scheduled in which the Union is a participant.[11] Provisions (3), (4), (6), and (7), above, shall apply for a period of 2 years from the date of the posting of the notice provided by the Order herein, or until the Regional Director has issued an appropriate certification following a fair and free election, whichever comes first.

In our view, the above remedies insure that each employee will be made individually aware of his statutory rights and will personally be assured by Respondent's highest ranking representative that those rights will be respected. In addition, the Union will be afforded a substantial period of time to present its views to employees off company premises in an atmosphere relatively free of restraint and coercion and, by requiring that the Union be given access to Respondent's plant in nonwork areas during employees' nonwork time, employees will be further reassured that Respondent will respect their Section 7 rights. Finally, by requiring Respondent to furnish the names and addresses of all current employees, the Union will be afforded an opportunity to present its view not only to employees on the payroll at the time the unfair labor practices were committed, but to reach, in addition, those employees who have not yet had a chance to

11. It is to be stressed that the access provisions herein are to remedy the extraordinary violations committed by Respondent against its employees because they supported the Charging Party. Contrary to Member Murphy's assertion, the Board is not thereby "forcing Respondent ... to support the Charging Party's campaign," but is instead permitting the employees to determine whether to support -or not to support - that Union "in an atmosphere free of further restraint and coercion." We find it unnecessary to consider at this time Member Murphy's hypothetical prognosis as to what might happen if another union intervenes in an election proceeding involving Respondent and Charging Party.

formulate their desires with regard to representation but who are nonetheless affected by the lingering effects of Respondent's violations.

In all other respects, we adopt the Administrative Law Judge's recommended Order as our own except that we shall incorporate the modifications specified above and modify his remedy so that backpay is to be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and interest as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Haddon House Food Products, Inc. and Flavor Delight, Inc., Medford, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or in any other manner discriminating against its employees because of their union activities.

(b) Threatening to discharge employees in order to prevent them from engaging in union activities, telling employees their fellow workers are being discharged as punishment for union activities, promising raises to employees to induce them to refrain from union activities, telling striking employees they are being suspended for engaging in protected concerted activity, or refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work.

12. See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist Teamsters Local 115, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Mark Spang, Charles Seppy, Kerrie Hurlbut, Lois Andrews, Belinda Evans, Daniel McGattigan, Robert Reamer, Gloria Hittner, and 14 other employees who were unfair labor practice strikers and who made unconditional application to return to work immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make all of the foregoing employees whole for any loss of pay or benefits they may have suffered by reason of Respondent's discrimination against all of them, with interest.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Mail a copy of the attached notice marked "Appendix"[13] to each and every employee at his or her home address, post copies thereof at its plant in Medford, New Jersey, and include a copy in appropriate company publications. Copies of said notice, on forms provided by the Regional Director for Region 4, shall be personally signed by Respondent's manager and owner, Harold Anderson. Copies of said notice shall be mailed by Respondent to each and every employee working at its plant on the date on which such notice is mailed, as well as each and every employee who worked in its plant during the period of Respondent's unfair labor practices, and additional copies shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Publish in local newspapers of general circulation copies of the attached notice marked "Appendix." Such notice shall be published twice weekly for a period of 4 weeks.

(f) Convene during working time all employees at its Medford, New Jersey, plant, either by shifts or departments, or otherwise, and have Respondent's manager and owner Harold Anderson, read to the assembled employees the contents of the attached notice marked "Appendix." The Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notices.

13. In the event that this Order is enforced by a Judgement of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGEMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(g) Upon request of the Union made within 1 year of the issuance of the Order herein, without delay make available to the Union a list of names and addresses of all employees employed at the time of the request.

(h) Immediately upon request of the Union, for a period of 2 years from the date on which the aforesaid notice is posted, grant the Union and its representatives reasonable access to the plant bulletin boards and all places where notices to employees are customarily posted.

(i) Immediately upon request of the Union, for a period of 2 years from the date on which the aforesaid notice is posted, permit a reasonable number of union representatives access for reasonable periods of time to nonwork areas, including not not [sic] limited to canteens, cafeterias, rest areas, and parking lots, within its Medford, New Jersey, plant, so that the Union may present its views on unionization to the employees, orally and in writing, in such areas during changes of shift, breaks, mealtimes, or other nonwork periods.

(j) In the event that during a period of 2 years following the date on which the aforesaid notice is posted, any supervisor or agent of Respondent convenes any group of employees at Respondent's Medford, New Jersey, plant and addresses them on the question of union representation, give the Union reasonable notice thereof and afford two union representatives a reasonable opportunity to be present at such speech, and, upon request, give one of them equal time and facilities to address the employees on the question of union representation.

(k) In any election which the Board may schedule at Respondent's Medford, New Jersey, plant within a period of 2 years following the date on which the aforesaid notice is posted, and in which the Union is a participant, permit, upon request by the Union, at least two union representatives reasonable access to the plant and appropriate facilities to deliver a 30 minute speech to employees on working time,

the date thereof to be not more than 10 working days, but not less than 48 hours, prior to any such election.[14]

(l) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. June 12, 1979

Betty Southard Murphy, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

14. Subpars. (i), (j), (k), and (l) herein shall be applicable only so long as the Regional Director has not issued an appropriate certification following a fair and free election.

CHAIRMAN FANNING and MEMBER JENKINS, concurring in part and dissenting in part:

We agree with the majority that this Respondent, in an attempt to thwart its employee's exercise of Section 7 rights, engaged in numerous and flagrant violations of Section 8(a)(1) and (3) of the Act. We are compelled to dissent, however, from our colleagues' refusal to grant the bargaining order remedy which the Administrative Law Judge recommended and the facts of this case so plainly require.[15]

At the outset we note that under Section 10(c) of the Act this Board is empowered and directed to take such remedial actions as will effectuate the policies of the Act. And the Supreme Court has clearly recognized that the Board, consistent with the statutory scheme, has broad discretion to devise remedies that will undo the effects of violations of the Act.[16] Furthermore, it is well settled that "the relationship of remedy to policy is peculiarly a matter for administrative competence,"[17] limited only by the interdiction against punitive remedies[18] and remedial measures that constitute a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."[19]

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15. Although we have not prevailed upon our colleagues to grant the bargaining order remedy which we believe the facts of this case warrant, we will grant all the extraordinary remedies, including equal access to the plant, as described and set forth at the conclusion of the majority's opinion.

16. *N.L.R.B.* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346 (1953); *Fibreboard Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216 (1964).

17. *Phelps Dodge Corporation* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941).

18. See, e.g., *Republic Steel Corporation* v. *N.L.R.B.*, 311 U.S. 7 (1940).

19. *Virginia Electric and Power Company* v. *N.L.R.B.*, 319 U.S. 533, 540 (1943).

In the instant case the Administrative Law Judge found, and we agree, that the Company's response to its employees' incipient organizational activities was a well-orchestrated antiunion campaign that featured repeated and egregious violations of Section 8(a)(3), and independent violations of Section 8(a)(1) of the Act. Based on his careful analysis of all the facts and circumstances of the case the Administrative Law Judge concluded - and nowhere do our colleagues dispute his conclusions - that Respondent's unfair labor practices were undertaken "to kill off the union campaign with finality" and that Respondent's conduct "precludes any rational expectation that a fair election" is possible in the foreseeable future. Mindful of the Board's obligation "to undo the effects of the misconduct to the extent possible," and in light of the teachings of the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), the Administrative Law Judge recommended a bargaining order even in the absence of a demonstrated card majority. To do less, in his words, "assures the Respondent of continued enjoyment of the fruits of its extreme unfair labor practices." We agree.

At this point it may be instructive to review briefly this Respondent's record of unfair labor practices. Such unlawful conduct included the termination of eight employees because they were involved in, or were suspected of being involved in, protected union activity; advising an employee that he did not have to fear layoff because the Company was aware that he had refrained from engaging in union activity but that other employees who exercised their Section 7 rights by engaging in protected activity would be discharged; threatening an employee with discharge if he persisted in consorting with employees known to be union adherents; promising pay raises to employees during a meeting called to discuss, among other things, the discharges of union adherents; sending a series of letters to employees striking in sympathy with discriminatees and in protest over Respondent's unlawful conduct, which threatened the employees with suspension or suspended

them because of their strike activity; and, finally, as discussed in detail in the majority opinion, *supra*, unlawfully rejecting the unconditional offer of striking employees to return to work.

Although our colleagues apparently would not quarrel with the conclusion that Respondent's unlawful conduct falls within the definition of "outrageous and pervasive" unfair labor practices[20] suggested by the *Gissel* decision as the touchstone for a bargaining order remedy "without need of inquiry into majority status on the basis of cards or otherwise,"[21] they decline - Members Murphy and Truesdale for reasons of policy and Member Penello because of his reading of the statute - to grant the bargaining order remedy recommended by the Administrative Law Judge. We have recently and at some length discussed in *United Dairy Farmers Cooperative Association*, 242 NLRB No. 179 (1979), the question whether and when a bargaining order should issue even in the absence of a proven majority for the union. Without repeating all the arguments advanced there, we note that the critical point asserted by our colleagues in the majority and concurring opinions in that case was that the principle of majority rule would be violated if a bargaining order issued in the absence of evidence that the union enjoys majority status. We, on the other hand, pointed out that: (1) the Board departs from that principle in various situations, including for example those cases in which it rejects the results of an election tainted by employer unfair labor practices and issues a bargaining order based on a prior card majority; (2) the Board's obligation to provide a full and effective remedy for unlawful conduct mandates a balancing of the Board's concern for *proven* majority status against the particular facts of the case and the Board's

20. *Gissel, supra* at 613--614.

21. Indeed, only with some diffuculty could one imagine a more extreme or serious campaign of unlawful conduct - short of physical violence - that the one undertaken by this Respondent in reply to its employees' initiation of organizational activity.

remedial objectives; and (3) in instances where, as was true in *United Dairy Farmers* and is true here, an employer has engaged in "outrageous and pervasive" unfair labor practices, denial of a bargaining order "would permit the coercive effects of Respondent's misconduct to go virtually unremedied and thereby defeat the statutory policy of giving employees a free choice in selecting a bargaining representative."[22] In our view the facts of the instant case demonstrate all too graphically not only the validity of the last point but also why the reluctance of our colleagues to issue a remedial bargaining order in these cases serves only to encourage the determined lawbreaker and to confirm his success in frustrating the exercise of employees' protected rights.

In the first place, we note that an inference should be drawn that the seriousness of this Respondent's unlawful practices has been magnified by the fact that we are dealing here with a relatively small employee complement. Thus, the Administrative Law Judge found that the appropriate unit stipulated by the parties contained approximately 56 employees at the time of the Union's demand for recognition and Respondent's refusal. Of this number, no less than 22 employees were directly, and almost immediately, the victims of Respondent's decision to trample on the Section 7 rights of its employees. Thus, in addition to 8 employees who were terminated outright, 14 other employees who demonstrated their support for their fellows by striking were promptly threatened with suspension or were actually suspended, and subsequently saw their unconditional offers to return to work unlawfully rejected.

In assessing the seriousness of Respondent's unlawful conduct, and in seeking to gauge its likely impact on employees, one must also consider the rapidity with which the Company struck after the first stirring of union activity

22. *United Dairy Farmers Cooperative Association, supra*, sl. op. p. 36.

on its premises, coupled with the fact that the Company's most serious violations of the Act were consummated in such a brief timespan.[23] Thus, within 1 day of employee activity on behalf of the Union in the parking lot adjacent to the plant, the Company discharged or laid off seven employees. Included among these seven, each of whom had signed an authorization card in favor of the Union, were warehousemen Spang and McGettigan, both of whom were prominent in soliciting employee support for the Union.[24] Thereafter, on November 24, Respondent went so far in its effort to underline its intransigent opposition to the Union as to discharge Gloria Hittner, a clerical employee whose only offense was that she was observed by management in conversation with striking employees. If any employees doubted the depth and intensity of Respondent's animus to the Union and the danger to those in the exercise of employee Section 7 rights, that doubt could hardly have survived the Hittner discharge.

In addition to violating Section 8(a)(3) by these discharges and by unlawfully rejecting its striking employees' offers to return to work as discussed, *supra,* Respondent engaged in the numerous independent acts of interference, restraint, and coercion found by the Administrative Law Judge to have violated Section 8(a)(1) of the Act. Based on these findings, it is safe to say that not a single employee in the unit could have been unaware of, or untouched by, Respondent's unlawful conduct.

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23. See *Vernon Devices, Inc.,* 215 NLRB 425 (1974).

24. The Board and the courts have long recognized that no employer conduct is more inimical to the purposes of the Act than is the discharge of employees because of their union affiliation or activities. Such conduct "goes to the very heart of the Act," *N.L.R.B. v. Entwistle Manufacturing Co.,* 120 F.2d 532, 536 (4th Cir. 1941), and its effect is particularly pronounced and lingering when, as is true of the instant case, the discriminatees include those who are well known as union activists. See, in this regard, *Armcor Industries, Inc.,* 227 NLRB 1543 (1977); *Superior Micro Film Systems, Inc., et al.,* 201 NLRB 555 (1973), enfd. 485 F.2d 681 (3d Cir. 1973).

In view of the foregoing and in light of the record as a whole, we agree with the Administrative Law Judge that Respondent's extreme unfair labor practices are of a nature to preclude for all practical purposes the possibility of dissipating or eliminating their coercive effects by the application of our traditional remedies. This is not to say that we are unmindful or unconcerned about the possibility of imposing on employees a bargaining representative that has not demonstrated in some appropriate way its majority status. However, for our part when, as here, an employer's flagrant violations have so polluted the environment that the wishes of a majority cannot be determined, we prefer to run the risk of a minority union than to run the opposite, and more probable, risk that a majority union will be shut out by reason on the employer's extreme misconduct.[25] Moreover, in the instant case the first possibility is greatly lessened by the fact that the Union had made significant progress toward organizing a majority of the employees in the unit prior to the Company's unlawful conduct. Thus, as found by the Administrative Law Judge, the Union held valid authorization cards from 27 employees in a unit that contained approximately 56 individuals. Although we cannot say with absolute certainty that absent the Company's unfair labor practices the Union would have achieved clear majority status, it cannot be gainsaid that the Company's gross misconduct made it impossible to resolve fairly the issue one way or the other. In these circumstances, we see no reason to withhold a bargaining order. As we have pointed out previously herein, to do so serves only to reward this Respondent for its serious and extensive flouting of the Act, to encourage others to engage in similar pervasive and egregious unfair labor practices, and, thus, ultimately to undermine and frustrate the policies and purposes of the Act.

In this case, Respondent by its unlawful actions effectively and quickly rid itself of practically all the union sup-

25. See, generally, *United Dairy Farmers Cooperative*, 242 NLRB No. 179, sl. op. pp. 35-39.

porters, who constituted nearly a majority of the unit. A greater, more sweeping invasion of employee rights can hardly be achieved, short of firing a majority of the unit. If a majority of the unit support the union and are fired for that reason, the issue does not arise because the union has enjoyed majority support. Thus the violations here present the outer limit of misconduct which the *Gissel* principles can reach; if not here, where?

Accordingly, we would adopt the Administrative Law Judge's recommended Order and require Respondent to bargain with the Union.

Dated, Washington, D.C. June 12, 1979

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PENELLO, concurring in part and dissenting in part:

I fully agree with the unfair labor practice findings of my colleagues. With regard to the remedial issues raised herein, however, my colleagues and I part company. Thus, as I stated in my separate opinion in *United Dairy Farmers Cooperative Association,* 242 NLRB No. 179 (1979), my colleagues err in failing to recognize that "[h]oldings of the Supreme Court, the plain words of the statute, and its legislative history" preclude the issuance of a bargaining order where, as here, the union never enjoyed majority status. The reasons underlying my position are fully set forth in my *United Dairy Farmers* opinion and there is no need to repeat them here.[26]

Dated, Washington, D.C. June 12, 1979

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

26. For the reasons stated in fn. 54 of that opinion, I do not agree with the full extent of the extraordinary remedies ordered by Chairman Fanning and Members Jenkins and Truesdale.

JD-699-76
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HADDON HOUSE FOOD PRODUCTS, INC.
and FLAVOR DELIGHT, INC.

and

TEAMSTERS LOCAL 115, affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN, AND HELPERS
OF AMERICA

Barry J. Rubenstein, Esq., *for the General Counsel.*
Stephen J. Cabot, Esq., and **Julius Steiner,** of **Pechner, Dorfman, Wolfe & Rounick,** of Philadelphia, PA, *for the Respondent.*
Jonathan G. Axelrod, Esq., of Bethesda, MD, *for the Charging Party.*

DECISION

Statement of the Case

THOMAS A. RICCI, A.L.J.: A hearing in this proceeding was held at Philadelphia, Pennsylvania, on July 20, 21, 22 and 23, and on August 2, 3 and 4, 1976, on complaint of the General Counsel against Haddon House Food Products, Inc. and Flavor Delight, Inc. together here called the

Respondent. The complaint issued on February 27, 1976, on a charge filed on November 21, 1975, by Teamsters Local 115, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, here called the Union. The principal issues of the case are whether the Respondent unlawfully discharged a number of employees because of their union activities, in violation of Section 8(a)(3) of the Act, and whether in refusing to bargain with the Union on request it violated Section 8(a)(5). Briefs were filed after the close of the hearing by all three parties.

Upon the entire record and from my observation of the witnesses, I make the following:[1]

Findings of Fact

I. The Business of the Respondent

Haddon House and Flavor Delight are New Jersey corporations engaged in the distribution, manufacture and sale of food products. They are affiliated businesses, located and doing business at the same premises in Medford, New Jersey, and have a common management and labor policy. I find that they together constitute a single employer for purposes of this proceeding. During the past year the Respondent sold and shipped goods valued in excess of $50,000 to points outside the State of New Jersey. I find that the Respondent is engaged in commerce within the meaning of the Act.

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1. A motion by the Respondent to disqualify the Administrative Law Judge is denied. I find no persuasion in the assertion that when a Hearing Examiner functioning pursuant to the Administrative Procedures Act, after attentively listening to 7 days of testimony, and after carefully reading and analyzing the record transcript, forms a mental judgement of the ultimate truth, he thereby reveals bias.

II. The Labor Organization Involved

I find that Teamsters Local 115, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A Picture of the Case

A sudden signing of membership and authorization cards in favor of Teamsters Local 115 occurred on November 13, 1975, among the approximately 60 warehousemen and truckdrivers employed by the Respondent. The activity took place largely on the parking lot adjacent to the plant premises where, as usual, employees were having lunch. Among the principal solicitors in the union campaign were Mark Spang and Daniel McGettigan, warehousemen. At 6 o'clock the following morning, as the men reported to work, Spang and McGettigan, with Charles Sepp[illegible] and Robert Reamer, two other warehousemen who had also signed union cards in the parking lot the day before, were summarily discharged without a word of advance notice of warning. Early in the afternoon of the same day three other warehouse employees - Lois Andrews, Belinda Evans and Kerrie Hurlbut - each of whom had also signed union cards the day before - were dismissed in the middle of their work shifts, again summarily and with no advance warning of any kind. The complaint alleges that all of these discharges were the Respondent's retaliatory reaction to the employees' union activity and in each instance a violation of Section 8(a)(3) of the Act.

Three days later, on November 17, Joseph Yeoman, business agent of the Union, showed Harold Anderson, the owner and top manager of the business, a number of Local 115 authorization cards and demanded exclusive recognition as the bargaining agent. The Company rejected the demand. The next day a number of employees ceased work

and started picketing. They joined the discharged employees who had already been picketing the premises. The pickets carried signs reading "Haddon House on Strike; Unfair Discharge." The complaint also alleges that the refusal to recognize the Union as bargaining agent that day constituted a violation of Section 8(a)(5).

Late in the afternoon of November 24 Gloria Hittner, a clerical employee, chatted with the pickets on the sidewalk. The next morning, when she arrived for work, she too was discharged without notice. This discharge is also called a violation of Section 8(a)(3) in the complaint.

Between November 17 and the end of the month the Respondent sent a number of letters to individual employees at their homes; letters went to some of the discharged persons and letters went to some of the strikers. Some letters said individuals were being suspended - including some of the strikers - and some letters invited individuals to return to their jobs, again including some of the strikers. On the 4th of December the entire group - discharged employees and strikers - came to the plant *en masse* and offered to go to work. The Respondent refused to take back any of them. The complaint alleges that by thus refusing to permit the strikers to return to their jobs - identified as 14 persons by name in the complaint - the Respondent violated Section 8(a)(3) as to each of them - i.e., discriminated against them because of their statutory protected concerted activities.

There are also several separate allegations of independent violations of Section 8(a)(1) of the Act, prohibited restraint and coercion in statements of management representatives.

The Respondent denies the commission of any unfair labor practices. As to the eight discharges - seven warehouse persons and one clerical - it defends on the affirmative ground of discharge for cause. Exactly what the Respondent's explanation is for its refusal to accept for work a number of strikers and dischargees after inviting them almost all, if

not all, to return, the record is not clear. Inconsistent statements were made by Company agents at the time and multiple assertions were advanced at the hearing.

Violations of Section 8(a)(3)

The question - did the direct dismissal of the eight employees constitute violations of Section 8(a)(3) - is the central issue of the case. If in fact this Company discharged all these people so summarily and highhandly to put an immediate stop to the self-organizational campaign, it was clearly the kind of "flagrant," "egregious" unfair labor practice that can only be remedied by an affirmative order to bargain with the Union now - majority or no majority evidence. *N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575. And the question of the true motivation in the mass dismissals in turn involves a pervasive issue of credibility. Can Harold Anderson, the owner and top manager, his son and co-manager David Anderson, and the subordinate manager called Jack Berman, be believed in their testimony of what was said at the time of the events, and as to what the reasons for the dismissals were? Or, on the total record, must the testimony of the discharged employees be credited instead?

By the end of the day on November 13, 21 employees had signed union cards; this was a substantial portion of the persons in the bargaining unit. It is a small plant, and so large a number of employees signing cards in such concerted action could hardly have escaped the notice of management. Spang said he distributed cards even inside the warehouse that day. Moreover, Robert Atkinson, a supervisor, was eating his lunch in his car on the plant lot while the flurry of card signing was taking place. Surely he was aware of the activity, and it has long been held that the knowledge of the

supervisor is the knowledge of the Company.[2]

Be that as it may, six of the discharged employees testified about the termination conversations. Five of them - the men and one woman - were released by David Anderson, the son and the rest were sent home by Berman. Their very pertinent testimony follows:

McGettigan: "He [David Anderson] asked me how come I wasn't working overtime. I told him because I had to go to school. Then he said that he was going to have to let me go because I wasn't working enough overtime and a few other reasons, but he didn't want to discuss them at this time....He said he wanted me to leave right away and he would pay me for the rest of the day."

Spang: "He told me that there was a lack of money and that he couldn't have me working the long hours that I was working - and he was going to lay people off according to seniority - and that's about it. ...He said that he didn't want me going back into work and that he was going to pay me for 8 hours for that day, for a full day. And that - well he just said that he don't want me to go back in there." "I didn't have a ride - I said that I didn't have a ride home and he said that he would get me Buzzy, the janitor, to give me a ride home."

Reamer: "Dave told me, he says, 'I hate to do this but we are very slow on work, we have lack of funds, and we have to lay you off.' ...He said, 'You can go home now. We want you to leave the place now and we'll pay you to six p.m..' "

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2. In its answer to the complaint the Respondent denies, via a negative pregnant, that Atkinson, as well as the owner of the business, his son the vice-president and principle manager, and Berman, called Director of Labor Relations, are supervisors within the meaning of the Act. It does not pursue this negative in its brief. The repeated references by a number of employees to Atkinson as their supervisor stands uncontradicted in the record.

Seppy: "David Anderson told me he wanted to see me in his office and he called me in and he said I was being laid off for lack of work and lack of money and the layoff was by seniority...He told me he would pay me for the rest of the day. It was all overtime until 5:00 o'clock I think it was, and he did."

The work in the warehouse consists of stocking merchandise in bins and on shelves, performed by stockmen and pickers who stock and fill specified order lists, who go along the aisles picking up cartons and containers and moving the orders along in carriages of one kind and another. In the course of this work there have always been accidental breakages of merchandise. Things fall down and are inadvertently broken. Everyone of the discharged warehousemen admitted on occasion to have made such errors, but each and everyone denied ever having damaged materials deliberately, and each one also testified, without contradiction, that he was never personally warned for such errors, much less ever threatened with discipline or discharge. Less than a month before the union activity there had been a meeting called by management for the very purpose of alerting the employees to be more careful, to make a better effort to avoid breakage because of the losses thereby falling upon the Company.

It is this long-accepted aspect of its business, repeatedly called "destruction" by Company counsel and by both the Andersons at the hearing, that then became the basis for the asserted affirmative defense of discharge for cause. Both Andersons talked at length as witnesses about the terrible and extensive "destruction" deliberately committed by the four warehousemen discharged, but the testimony of David, the son, adds nothing to the defense, for he admitted that he saw none of it, and that all he was graphically picturing was what his father saw and told him. We come to the testimony of the father, Harold Anderson:

Why was Seppy discharged? "I saw Mr. Seppy doing damage to merchandise...On the afternoon of the 13th of

November 1975 I saw Mr. Seppy, personally, doing damage, serious damage, to merchandise in our warehouse....I saw him with a forklift run into a pallet of merchandise, canned goods. He hit it, he backed off, and he hit it again....He was doing it deliberately, sir. That is how it appeared to me." Again: "I saw Mark Spang hit one of these pallets of merchandise, with a good shot - there was no reason to - and he hit it again."

Reamer: "He pulled merchandise off of a pallet, that was on the bottom, and as a result of it the pallet on the top collapsed, spilling merchandise all over the place. He kicked a carton in rage and threw a carton against the wall." "Q. Did seeing this upset you? A. Absolutely. Absolutely it upset me....How could I not be angry?"

Spang: "The same day I saw Mr. Spang, with his handcart that he normally assembles orders, go down an aisle in what we call brakes, and he ran this handcart into a pallet of merchandise, destroying merchandise, some of it, on that pallet. He then gave it another hit...He then gave it another hit, hit it the second time, to make sure that he did some damage to it." Anderson's testimony continues: "A short time after that I saw Mr. Spang in an aisle where we kept canned fish. And he cut a case of merchandise in half, which the order called for a half of case apparently. I didn't see the order. The remaining part of this stock, he threw it back, resulting in a lot of the merchandise spilling out of the carton and falling to the floor. He made no effort to pick it up."

Anderson's story is that he saw Seppy do the damage he described at 2 p.m. on the 13th, Spang destroying property at 4 o'clock and Reamer doing damage at 4 or 5 o'clock. He continued to testify that "That night I worked all night," and that, while he was still at work when McGettigan arrived at 6 a.m. he saw McGettigan also misbehave. "He was bringing down freight from the top of these shelves and dropping it onto the floor. Instead of getting it down the way it should be, he was just dropping it down. When I saw this, he was also on the list."

One asks: What are the probabilities a mature business man, as successful as this Mr. Anderson, would stand by watching such wanton destruction of his property without saying a word of criticism to his employees? Asked why he did not discharge these men then and there, the witness said he leaves dismissals to his son. But there is clear evidence that only a few months earlier he had summarily dismissed another employee for only smoking in the warehouse contrary to the rules. This time he did not even tell the men to please stop what they were doing. Anderson closed with saying that at 9:30 p.m. on the 13th, he asked his son to dismiss the first three men, and that the next day at 6 or 7 o'clock he told him to release McGettigan.

David Anderson's version of what he told the men when he dismissed them is no less relevant to the credibility of the contention of discharge for cause.

Seppy: "I told him of the events that had taken place on November the 13th, what he had been seen doing as far as destruction in our warehouse, I asked him if he had any comments, he said that he did. I said 'What is that?' He told me that he was sorry, that he would like a second chance....."

Reamer: "....I said, 'Bob, I don't like to do, I don't like to say what I have to say to you....You were seen on November the 13th in our bulk storage room destroying merchandise intentionally.' I asked him if he had any comments. He said to me 'Elaborate on it.' I said 'Bob, you were seen in the bulk room pulling merchandise from bulk storage undermining one pallet which caused the pallet to collapse and fall to the floor. You were then seen picking up one carton and throwing it and you were then seen kicking a third carton. Do you have any comments?' He looked at me and said 'I have absolutely no comments at all.' I said 'Bob, check out, we'll pay you for the remainder of the day, and you are permanently terminated.' ".

Spang: "I told him of the events that he had been seen doing on November 13th, and I asked him if he had any questions...He then told me he had no way to get home and I said to him 'I will get someone to drive you home. You're terminated, you're fired, and I'll pay you for the remainder of the day.' "

McGettigan: "....I said to him he was well aware of the problems that we were having with him. One problem was tardiness; the second problem was damaging merchandise which had been discussed with him previously; and the third was his intentional destruction of merchandise that morning. I said 'Do you have any comments?' And he seemed to be - he didn't care one bit. He just said to me 'Does that mean I'm fired now?' I said 'Dan, we'll pay you for the remainder of the day, you can punch out and go home.' "

Again questions arise. Why should David Anderson speak so gently when terminating employees for having only the day before committed unpardonable offensives so vividly described at the hearing? Why was he almost apologetic towards Reamer? More damning to the defense, would an employer getting rid of four men who had "deliberately" destroyed Company property - almost enjoying the practice, according to Harold Anderson - make them the gift of a day's pay, to say nothing of obliging one of them by having the janitor cease work and driving the discharged culprit to his home? Why the great urgency of getting them out of the building before they could exchange one word with the remaining employees?

Lois Andrews was one of five women packers in the warehouse. At lunch on November the 14th she solicited union card signatures in the ladies' room. Shortly thereafter David Anderson called her, her sister-in-law Belinda Evans and a third woman packer named Kerrie Hurlbut - to his office in succession and fired each one - again without notice or warning. From Andrews' testimony: "...he told me that I must know by now that there's been people laid off due to the lack of work. I got upset and started crying because he

told me I was going to be laid off. Then he said 'I know your husband's out of work and you have three children.' I said 'Yes, I need this job very much.' Then I told him 'Just because I talk to the people and hang around with them doesn't mean that I'm doing the same thing they are.' And that's when he told me to call him the next morning about my job." Andrews added that she and the other women discharged that day had once been told not to talk too much at work, and to work faster, but that she had never been warned or disciplined because of her work performance. As to this girl, David Anderson said only that he told her she was being laid off temporarily, and that she would be recalled when the pickers again became busy. Concerning the other two - Evans and Hurlbut - Anderson told them, as he testified, that each was being laid off that day because there was not enough work for them to do - a "lack of order production" - and that they would be recalled when necessary.

Hittner, the clerical employee, testified that at 5:15 in the afternoon of November 24 she went outside and "talked to the guys and they said later that evening that Joe Yeoman would be there if we wanted to talk to him about anything. So at work the three of us went out and were talking with Joe Yeoman, and the rest of the guys that were out there, about different things for the Union." The next morning, when she arrived, still according to her testimony: "Mr. Berman came across the hall and asked to see me in his office. It was him and myself in the office. And he was saying that he wanted to start benefits for the people inside of Haddon House and not outside. And he said that he noticed that me and a few other girls had been agitating with the men outside. He said if that's the way they wanted it, he said that I could leave; he said goodbye, and he said that I could have an escort to the door...and he said to Dorothea, the lady that was in the office with me, to escort me to the door because they wanted to make sure that I was out of the building."

Jack Berman, who called himself "general manager" of the business - "I interface between the office and the

warehouse" - spoke of the departure of Hittner on November 25. He started by relating how she had been suspected of eavesdropping over private conversations at the phones, how he had heard suspicious "clicking" on his phone after the "labor difficulties occurred," and how he had therefore transfered her upstairs to the purchasing department. After saying Hittner had always been "a good worker," he then said the purchasing clerk complained "that Gloria was not attentive, there were too many errors being made, that she doesn't seem to have her mind on her work, there's too much walking around, she's not at her job enough although she's present. But mainly because she was not doing her job." With this, Berman continued, he called her to his office for a talk, where he told her "....You have sort of lost your dedication. I don't know what is bugging you. I hope it is not the labor problems out there." At this point in his testimony Berman took off on a general discourse about the employee's emotionalism and a general tendency to get excited. He spoke of her having seen disturbing events on the picket line, and generally discoursed upon the correctness of his final action. When he finally got back to the termination interview: "So I told her - this is coming back to the interview in my office - that if she is being affected with what's going on out there, she shouldn't be be during the time - or try not to have it affect her work during the time that Haddon House is paying for. No matter where how sympathies laid, I really didn't care; all I was interested in was that her time belonged to me during the time she was getting her paycheck. And I asked her if she could see herself in such a position, like she was before, to do her work and be a dedicated employee again....She became very upset...and she sort of half screamed, 'I can't work here any more,' and got up and walked out of my office. And at that point I called to the first person I saw, who was across the hall, a woman by the name of Dorothea Mathews, and asked her to escort Gloria downstairs because I didn't know where she was going. She could have fallen down the stairs for all I know." No witness was called to substantiate or give objective reliance to any of Berman's conclusionary statements.

On this entire subject of the discharge of these eight employees I do not credit the testimony of Harold Anderson, David Anderson or Jack Berman. I find incredible Harold Anderson's story of the misconduct of the first four men. Wherever the testimony of all three of these Company witnesses conflicts with that of the six employees who appeared as witnesses, I credit the employees against the Company agents. And I do not believe - with respect to any of these eight employees - that the Respondent in fact released them for the reasons advanced at the hearing or as assertedly stated to them at the time of release. The inherent incredibility of Harold Anderson's story - outrageous and deliberate destruction of Company property in plain sight of the owner but totally ignored by him at the moment of its repeated occurence - is only one reason for this broad crediblilty resolution. The very high improbability that David Anderson would speak the way he said he did, while firing the four men, and graciously pay them for an extra day, is also but one other reason. There are a number of additional factors, chief among them the demeanor of all three Company witnesses at the hearing.

Harold Anderson refused to produce his Company's hiring and employee status records in defiance of a ruling denying his motion to quash the Government's subpoena. Twice during the next several days of the hearing he reversed his position, saying he would and would not bring them to the court. Company records are best evidence because they are objective and presumptively tell the truth. Why was he trying to hide the truth? He finally said he would produce the records, and brought records to court for that purpose. After saying these were the records showing just who was at work at the time of the events, from the stand, as a sworn witness, he then blandly said he did not know whether or not they were in fact the records he had just said - from off the stand - they were. To the extent of his participation in the hearing on this complaint, this man can not be believed.

Both his son and Berman mixed virtually all of their answers to critical factual questions with extended

arguments of why what they were about to say they did had justification in other events which were not then at issue. Their testimony is more argument, evasion of direct answers, and coloration, then it is plain speaking. A number of times Company counsel interjected in the course of cross-examination of these witnesses with comments such as "If you know," whereupon the witnesses claimed to have no recollection. At one point Berman said that certain letters - received in evidence and bearing date November 24 - were mailed that day. But some envelopes in which the letters were mailed are stamped November 25 as the day when, in the Company's office, they were processed through the Company's in-office stamp machine. Of no less significance are both Berman's and David Anderson's responses, a number of times to purely factual inquiries, with virtual legal conclusions such as "they were regular part-time employees." But these are legal words, and indicate a planned intent to avoid giving true testimony. If total demeanor means anything these three witnesses gave every evidence of being untruthful as I looked at them.

I credit the testimony Seppy, Spang, McGettigan, Reamer, Andrews and Hittner as to their discharge conversations.

In the case of Hittner, the manager told her, when she first returned to work after mixing with the pickets on strike, that he disapproved of her "agitation" with the unioneers, and fired her on the spot. The proof is direct, and the discharge is therefore clearly unlawful.

The other five who testified were told something else. The four men denied having destroyed or damaged any property the day before, and I believe them. Anderson told Andrews there was "a lack of production orders." The Charging Party subpoenaed Company records relating to the volume of business done from November 13 forward. The Respondent refused to produce such records. Apart from the fact that Anderson's conclusionary statement stands barren of objective support, the law has long been that in these cir-

cumstances an adverse inference is warranted. I deem this equally true with respect to Evans and Hurlbut, who were also told the same thing when discharged without notice that day, according to Anderson. The payroll records show that up to the very day before these three women were told there was a lack of work for them, a great majority of the warehouse employees had for weeks been doing 50 to 60 and even 70 hours weekly. So sudden a reduction in orders (during the admitted peak season!), even had it really occurred, which I do not believe, could easily have been taken care of by eliminating the then unnecessary expense, the overtime payment at time-and-a-half.

The four men and Andrews were not fired for the reasons advanced by the Respondent then and now. But reason there had to be. Why were they discharged that day? It is an inference case and rational inferences are inescapable.[3] The reasons advanced at the hearing are false. The reasons that David Anderson in fact stated at the time of discharge - as shown in the credited testimony of the employees - are also not true. The Respondent admits the last 3 months of the year are its peak volume period. The record proof of the incredible amount of overtime work performed by most of the warehouse employees for weeks before November 14 is so cumulative there is no point in detailing it here. Such a drastic reduction in the volume of business could not have been noticed so unexpectedly as to demand dismissal of so many employees at one fell swoop.

Harold Anderson normally comes to work at about 11 a.m. This time he was at work at 6 a.m. on the 14th and had been on the job - if he is to be believed - continuously from at least 2 p.m. the day before. His son normally comes at 8

3. From the Board's Decision *W.T. Grant Co.*, 210 NLRB 2622:
"Illegal motive has been held supported by a combination of factors, such as 'coincidences in union activity and discharge' ... 'general bias or hostility toward the union' ... 'variance from the employer's normal employment routine'...and 'an implausible explanation by the employer for its action'...."

a.m., but this day was in the office at 6 in the morning. What can explain all of these extraordinary occurrences? When unusual things happen, and the rational mind knows there must be some reason for them, the element of timing of necessity comes in to play. Actually, it requires very little inference to connect the card signing on mid-day with the unannounced dismissals the next morning at 6 o'clock. The conclusion that for the least Supervisor Atkinson who was nearby having his lunch while all the card signing was going on in the parking lot, knew what was going on is fully warranted. In 1974 an older and experienced employee, Schaefer, had been active in a prior union campaign, and, according to his credited testimony - because I do not credit the denials of either of the Andersons in this case - was first told he was being dimsissed because of his such activities but then reinstated with a warning not to do it again. Early in the morning of November 14, 1975, still according to Schaefer's credited testimony, but before discharging anyone, David Anderson said to him in the privacy of his office "...that he knew that I didn't have anything to do with it, that the previous year he waited all day before he laid me off because of union activity, but this year he wasn't - that I had nothing to worry about, that all I had to do was my job during the day and not worry about anything no matter what was going to happen." "He told me that there would be some guys leaving the plant that day and not to worry about it that it didn't involve me...he said that he would cut it off short, he would nip it in the bud." I think, on this particular record, and considering all the related factors - including additional aspects that do not need repetition here - the logical inference of knowlege in the Andersons is fully warranted from the timing of the events alone.

I find that the Respondent discharged Seppy, Spang, Reamer, McGettigan, Andrews, Evans, Hurlbut and Hittner because of their union activities and thereby violated Section 8(a)(3) of the Act eight times.

Independent Violations of Section 8(a)(1)

1. I find that David Anderson's statement to Schaefer very early on November 14, that this employee would not be laid off while others were going to be released to curb their current union activities constituted a violation of Section 8(a)(1) of the Act. Cf. *New Castle Lumber and Supply,* 203 NLRB 937.

2. Employee Dennis Wuest, later a striker, testified, without contradiction, that on November 21, when he went home for lunch he took Reamer from the picket line with him and later brought him back. Reamer, discharged illegally on November 13, had been picketing for several days. When Wuest returned to work, Robert Atkinson, the supervisor, said to him: " 'I know you're with those guys and I think that you're a two-face so-and-so' and he said that those guys gave me a lot of mouth too but I ain't worried about it, and he says - I told him, I says 'Why, just because I picked up Reamer?' And he said 'Yes.' And then he told me, he says, that if you don't watch it, you'll get yours one of these days." I find that the supervisor threatened Wuest with discharge if he should decide to act in favor of the Union, and thereby violated Section 8(a)(1), an unfair labor practice chargable to the Respondent.

3. After the seven employees had been discharged on November 14, the rest of the warehousemen were called to a special meeting, at about 4 p.m., where Harold Anderson spoke to them. According to the employee witnesses who testified about the meeting, Anderson spoke of damage to property, the fact the employees were now fewer, and that all of them would now have to work longer as a result. The question of raises was brought up; whether it was Anderson who brought up the subject or the employees is not clear on the record. Be that as it may, with the employees almost all at the time doing very much overtime work and being told they would have to work still longer hours, the subject of money was a natural. According to employee Wuest, Ander-

son said "that we'd get a raise, but he didn't know how much, and he said it would probably be effective on Monday the following week." "He said he really couldn't afford it, but he said we would get a raise." "He said he'd think about how much money he would give us about a raise." From the testimony of Paul Masi: "He proceeded to say that he couldn't afford it but everybody would get a raise, and he said that it would be retroactive Monday morning." The other witness, Schaefer: "And then he said - he brought out that he would check with his auditors over the weekend and although he couldn't afford it, we would get a raise, and the raise probably wouldn't start for two or three weeks, but they would be retroactive back to November the 17th."

Harold Anderson, who was doing the talking that day, said the employees asked about a raise, and that after explaining the "rut," or "hole," or "near disaster" the Company was in "....I said...I am going to review this whole thing and if I can possibly afford anything you'll get a pay raise and it would be retroactive to the following Monday."

I am convinced the employees gave the more reliable version of Anderson's words - an ambiguous promise, albeit conditioned, of a future raise, but with assurance that when it came it would start the following Monday retroactively. Anderson was talking on a Friday afternoon. He had just discharged seven employees he could ill afford to lose, when the amount of overtime being performed by everybody was immense. He wanted to separate the remaining employees from the discharged ones, a technique which would both assure work performance and weaken the movement towards united action by the entire complement. Anderson violated Section 8(a)(1) of the Act by this promise of a raise in the teeth of the employees' union activities, and almost simultaneously with his illegal discharge of others, the leading activists among them.

Return of the Strikers

As stated above, from November 18 on there was a strike. On the picket line there were the eight illegally discharged employees, and a number of others. Fourteen employees who were not discharged but chose to strike are named in the complaint.[4] There were other strikers, not identified completely on the record.

On December 4 the 14 named strikers and the eight dischargees together appeared at the plant and offered to go to work. The Respondent refused to let anybody in and the employees simply resumed their picketing, which was still going on at the time of the hearing.

A major allegation of the complaint is that on December 4 the 14 strikers, not to be confused with the eight dischargees, "made unconditional offers to return to their" jobs, and that because the Respondent refused to reinstate them, it hereby violated Section 8(a)(3) of the Act. That Section of the statute, of course, deals with unlawful discrimination in employment, or, in plain language, denial of employment - whether it take the form of discharge from the job, refusal to hire in the first instance, or telling a striker who wants to come back to work "I will not take you." There is reason here for so plainly stating the true meaning of the language of the complaint because a very plain fact about the offers to return to work is ignored by all the parties, including the General Counsel in his post-hearing brief.

These were unfair labor practice strikers. They left work to join their fellow employees on the sidewalk who had been fired; the eight in question had in fact suffered unlawful

4. McIntosh: In its brief the Union charges that one of the pure strikers - McIntosh - was out on the picket line because he was discharged in violation of the Act. The complaint does not so allege and the General Counsel does not so contend. A charging party has no standing to add allegations of Section 8(a)(3) violations to the Regional Director's complaint.

discrimination at the hands of the Respondent; the signs all the strikers carried literally read "Discharges Unfair"; and when the strikers offered to quit their strike and return, they were accompanied by the dischargees. On the evening of December 2, 2 days before the attempted mass return to work, there was a meeting at the house of one of the strikers, Ritchie. Present were all 14 strikers and the eight dischargees. Present also was Yeoman, the union representative. All these people discussed the situation and together decided what to do. It is the nature of the decision reached there by the group, and the attempted implementation of that decision 2 days later by the strikers, that is determinative of the complaint allegation of illegal discrimination against the 14, and that mandates dismissal of that allegation. The truth of the matter is that all 14 strikers decided they would abandon the strike and go to work only on an "all or none" basis, i.e., on condition that the Respondent at the moment restore all 22 of the employees to their old jobs. Where the complaint reads the strikers "made unconditional offer" it is wrong; where the General Counsel in his brief contends the Respondent rejected this "unconditional offer" he ignores the clearest facts of record.

The extended transcript is interspersed with references to unrelated facts, occasioned by collateral defenses argued by the Respondent. It asserts the offer was conditioned on reinstatement of supervisors, a condition which strikers have no right to impose. It also argues the returning employees - both dischargees and strikers! - came too late, they should have arrived by November 28 because the Company had so invited each of them individually. Were Masi and Schelhause supervisors in fact? Were the letters of recall received on this or that date? These questions confuse the record. But the following testimony stands clear:

Yeoman was the first to testify: He said that at the meeting at Ritchie's house, he told the assembled group "the company's intentions were that everybody comes back to work...that our position would be better if we'd go back to work and take up the matter through the National Labor

Relations Board as far as the discharge or laid off employees...." This statement alone shows the intention of all was that the dischargees were to go back to work also. Yeoman continued it was then decided not to go back on the third, but to wait for the fourth, because there were three women who first had to arrange for babysitters before they could work. These were the three - Evans, Hurlbut and Andrews - who had been discharged. And again Yeoman was actually saying the agreement among the strikers was that the discharged persons also had to be taken back by the Respondent. Asked bluntly on cross-examination had he not told Berman, of the Company, that he wanted "everybody" back as a condition of anyone returning, again and again Yeoman avoided answering.

From Spang's testimony: "Q. And you wanted - when I say you - you and the other strikers decided that all would have to go back, including Masi and Schelhause, at once, together, or else nobody was going to go back, is that true? A. Yes." From the testimony of Gillespie, a striker: "Q. At the meeting at Ritchie's house, everybody was there decided that everybody that was fired had to go back or nobody, right? A. Right." Again, McGettigan, a dischargee: "We decided that if everybody wasn't going back, nobody was going back. We had no particular names; we didn't point anybody out, individually."

There were two other union agents at the December 2 meeting - Sheahan, coordinator of Local 115, and a Jimmy Smith, a staff member. From Sheahan's testimony about what was decided that night "...it was the position of the union that everybody should go back to work and we should hope to work out an earlier settlement of our problems...As far as we knew, all seven of those people had been offered reinstatement by the Company. Other people who had honored the picket line had received similar letters suspending them - not suspending them, ultimately offering them their jobs back were also willing to go back...The major conversation during that meeting was not whether or not

everybody was going to go back because we assumed that everybody was going to go back..."

The rationale of decision here simply starts with the plain fact that these people were strikers on December 2, and were still strikers on the morning of December 4 when all of them arrived at the plant. Some had received suspension notices - starting after they started striking. The question now must not be befuddled by that matter. No one suggested at the hearing that in December any of the 14 strikers listed in the complaint were not on the sidewalk because they *chose* to be there. They were protesting the discharge of the eight, the General Counsel calls them strikers in the complaint, and he now argues the Company was obligated to take them back that day *because* they were unfair labor practice *strikers*.

Nothing could be clearer than the fact they conditioned their return upon simultaneous reinstatement of their unlawfully discharged fellow workers. The employer refused to take back the eight and the strikers continued their protest striking and picketing. The law is clear. People may strike because the employer has committed unfair labor practices; they are protected when in such strike status; the employer must take them back when they change their minds and no longer care to withhold their services in protest; and the employer must even remove any employees he had hired to replace the unfair labor practice strikers when they want to come back. These people chose to continue their strike on December 4. They are still out on the street; the unfair labor practices committed have not been remedied - because the eight are still out against their will. And when any of the 14 do come, without conditions imposed, and ask for their jobs back, should the Respondent reject them it will be committing a direct violation of Section 8(a)(3).

Both the Company agents - managers and lawyer - and the union man, Yeoman, used ambiguous and deliberately con-

fusing language at the hearing in describing the December incident. They merged reasons with plain statements of fact of what was said. This is because both sides were seeking to inject other elements. The Union was trying to create the impression each striker was acting independently of all the others - and never mind the contrary proof. The Company kept talking about letters - deliberately confusing and self-serving - sent to the four discharged warehousemen, and thereby attempting to avoid backpay liability to them from that day forward. But the question of whether the unfair labor practices against the eight were totally cured that day stands apart from the entirely separate allegation that the 14 were wronged. Plainly put, on November 18, when the 14 first struck, they were telling the Respondent "we will stand on the sidewalk until you take back the eight." When they came on December 4 they were again telling the Company "we will come to work if you put the eight back to work." The two objectives are exactly alike. I shall therefore recommend dismissal of the complaint as to the 14.

This complaint allegation disposed of on this basis, all other contentions advanced with respect to the same issue are mooted. Were it necessary to decide I would find without merit any of the defenses advanced by the Respondent. The idea that it had a right to deny employment to the 14 strikers because, told to report to work by November 28, they delayed until December 4, is absolutely pointless, and merits no discussion at all.

The contention that the 14 insisted as a condition of returning that a man named Schelhause also be taken back is not proved on the record. Schelhause was an employee discharged before the strike started, and at times joined the pickets. The Company says he was a supervisor, and there is no evidence he was not. But Schelhause was not at the December 2 meeting and was not at the plant when the group on December 4 offered to return. Use of word "everybody" by Yeoman and the employees therefore is by no means proof that Schelhause was involved in the offer. He simply had nothing to do with this case.

Paul Masi, a warehouseman, was a striker, and was among the returning strikers. The Company says he a [sic] supervisor, and as the group wanted "everybody" to come back, the offer imposed an unwarranted demand upon the Company to hire a supervisor. I find, on the total record, that Masi - whatever his functions - was not a supervisor within the meaning of the Act. He went to some management meetings, but so did a number of conceded rank-and-file employees, as the record amply shows. Much was made over the assignment of overtime work, and the Company tried again and again to have witnesses admit Masi arranged the overtime. The fact of the matter is that this warehouse operates very loosely, everybody working so long as there is work to be done, until orders are completed, and everybody doing very unskilled work, the Company permitting people to decide, by simply seeing what others are doing, to work as long as it is necessary. There are regular supervisors in the warehouse anyway. It must also be noted that while contending Masi was a supervisor the Respondent insists Angelo Patelo, also a disputed employee, must be deemed a rank-and-filer. The record shows the two men virtually have parallel authority. They were working, non-supervisory employees, and therefore are both included in the warehousemen bargaining unit.

A final argument, made by the General Counsel in his brief, deserves comment. He says that even assuming the returning strikers had decided it was to be "all or none," and in fact would not have returned had the Company denied a job to any single one of them, the Company never knew this, and therefore that fact of life cannot be deemed pertinent now. The idea gives rise to interesting speculation. Yeoman, of the Union, had called Manager Berman the day before to check whether the letters of recall had been sent to "everybody," and I believe his testimony that the manager said "yes." Could it be that, on thinking it over, when management saw itself faced that morning with all the employees acting in concert, it saw in the mass movement that same "union" activity which it had so violently tried to choke off only a few weeks earlier and decided it

would have none of it? In that event, the position might be viewed as illegal motivation in denying employment. The complaint does not allege this.

But if this coin be turned around - again as pure speculation - could it be that the Union, acting through Yeoman and his partners the night earlier, seized upon the fortuitous sending of all the individual letters, to turn the situation to its advantage by "concertedly" moving to end the strike and in a substantial sense establish its right to speak on behalf of all the employees - a right it had asked for but been denied in November? This entire case - from the start with all the double talk by Company and Union in November and continuing even after the hearing closed with motions and briefs submitted by Company and Union - is replete with trickery and deception. Whatever speculation may be provoked by the whole story, decision must rest upon the objective facts.

Violation of Section 8(a)(5)?

On November 17 Yeoman, of the Union, went to the Respondent's office, together with two other union agents and two of the discharged men, and demanded recognition on behalf of the Union. He placed a number of authorization cards in Harold Anderson's hands; the owner looked at them, handed them to his assistant, Jack Berman, and then told the union agents they could go to the Labor Board instead, he would not grant recognition. No need to discuss what was said there that day. Anderson at one point testified he had the signed cards in his hands "two or three seconds, four seconds," and returned them. His manager, Berman, also looked at the cards: "...He [Yeoman] asked me if I wanted to see the cards. I said yes. He handed me the cards."

Majority status, as alleged in the complaint, can only be tested against the total in the bargaining unit, and, largely because of the Respondent's deliberate refusal at the hearing to produce its true records pursuant to subpoena, there

is considerable confusion as to just what employees were at work then. After every attempt to frustrate the orderly course of the hearing, the Respondent produced what was ostensibly a complete roster of employees at work during November of 1975 - 94 cards bearing limited information about its employees, and they were received in evidence. They are not complete records, for the testimony shows others were at work also. Why the General Counsel elected not to compel full compliance with the Government subpoena I do not know.

In any event, after much vacillation, day after day, by both sides as to who should or should not be included in the 100 percent total, the shifts of position even continuing in the briefs, the conflicting contentions, I think, emerge as reported here.

The appropriate bargaining unit is described in the complaint as follows:

All truckdrivers, warehousemen, checkers, pickers and packers but excluding all other employees, guards and supervisors as defined in the Act.

The parties stipulated to inclusion of 40 named employees. To these the General Counsel correctly contends there should be added the seven employees who were discharged illegally before November 14, 3 days before the demand and refusal. The total thus becomes 47.

The parties disagree as to the following persons:

Paul Berman, son of Jack Berman the manager (who owns no stock in the Company), drives a truck and works in the warehouse. There is no evidence of special status enjoyed by this man on the job but the fact he has a key into one of the sections of the building. As one employee testified, he is not "treated any differently than any other employee." I do not think this one fact, plus the fact Paul lives with his father who charges him no rent, suffices to

remove him from the unit. He is therefore included as a regular employee.

Dennis Atkinson and *Michael Watson.* At the hearing the General Counsel urged exclusion of these two men as casuals. He abandoned the contention in his brief. I find they were regular part-time employees for several weeks before November 17 and are therefore to be included.

Gary Claypool was hired in September, worked full-time - including much overtime in the weeks before November 17 - and joined the strikers. The Company would exclude him on the asserted ground its original intention was that he be only temporary. Aside from the Employer's conclusionary statement, there is no supporting evidence to substantiate the assertion. The record does not prove the man intended to work only briefly, and case precedent involving school boys who work summers and then go back to school, is therefore inapposite. Merely because Claypool had "educational aspirations" in November of 1975 and in fact did go to college almost a year later, does not mean he was not a regular employee in November. He is included in the unit count.

Charles Knauf, for some time a clerical employee in the computer room, was assigned to do regular warehouse work 3 weeks before November 17 and worked there full-time until he joined the strike. During that 3 week period he did about 3 hours daily of overtime in the computer room. He was shifted away from computer work because a new system installed eliminated the need for him. I do not credit the testimony of Harold Anderson, contradicted by the employee, that he told Knauf, before the change of job, that it was intended as only "temporary," or his testimony that he, Anderson, intended it to be temporary. I believe instead Knauf's testimony that he was given a choice when his limited skills in computer work become determinative, and that he was just told he could have a job in the warehouse. Knauf is included in the unit.

Paul Masi has already been found not to have been a supervisor, as contended by the Respondent, and is therefore included in the unit count.

Barbara Bowker and *Catherine Smith* worked primarily in the Flavor Delight section of the Respondent's unified operation. The parties kept changing position again and again during the hearing on whether Flavor Delight employees should or should not be included. It seems they are now in agreement that all should be joined. Bowker and Smith are therefore to be included.

At the hearing the Respondent contended, but offered no evidence in support, that seven employees who started work late in 1975 be included. The employment record cards of these men show each was hired for the first time after the demand and refusal. Accordingly, Menei, Irvin, Helsm, [sic] L. Ferguson, T. Ferguson, J.R. Atkinson and J.H. Atkinson are excluded.

Angelo Patelo has been found not to be a supervisor. He is included in the count.

Carmine Sorino is an old man who worked 4½ hours the week ending November 1, 3½ hours the week ending November 8, 3¼ hours the week ending November 15, and not at all the following 2 weeks. At the hearing the Respondent argued for his inclusion. The evidence as to what this man does is utterly confusing. One man, Masi, a real full-timer in the warehouse, said quite credibly he had not seen Sorino in the warehouse for a long time before the strike. Whatever he does for the Company, I find Sorino was truly a casual employee and therefore exclude him from the unit.

Michael Diamond was a regular truckdriver, some times away from the plant for more than 2 weeks at a time making long distance deliveries. The payroll records show he was a very regular full-time employee at the time of the events. The General Counsel's assertion he was a supervisor is not supported by the evidence. Diamond is included in the unit.

John Morrow worked here since 1960, one of the oldest employees in service. He was out on sick leave from September 1975 to January 1976 because of a broken hip. He testified that his duties on receiving and stocking were passed on to Masi in August of 1975, and that even prior to that day he exercised very limited if any supervisory authority. The General Counsel would exclude him from the count on the ground that he was a supervisor even in September when he fell sick, but the only evidence in support are conclusionary statements by two employees, Schaefer and Masi. Schaefer said Morrow used to "straighten out stock." And Masi said he was the "Lead Honcho." As best I can understand the total evidence Morrow used to do what Masi later did, and if Masi according to the General Counsel, was not a supervisor, I do not understand how he could make a contrary contention with respect to Morrow. I do not think the probative evidence, considering the entire record, warrants excluding Morrow from the unit.

Albert Romano, whom the General Counsel would exclude as a casual employee, worked 13 hours the week ending November 1, and 20, 23, 32 and 31 hours each of the subsequent weeks. The record otherwise contains no substantive evidence upon which to justify his exclusion. Romano is included in the unit.

To this point we have it that the count shows 59 rank-and-file employees to be counted as included in the bargaining unit on November 17. There is dispute, seemingly, as to a few others, but it is not really necessary to resolve them now. The Respondent wanted to include a man named Steven Moir, but his card shows he was terminated on November 12, 1975. There is a card for Lorraine Bleckley, which shows only a question mark as to when she left. Neither of these two can be counted in. A woman named Paula Papp, formerly a secretary, appears to have been, according to the Company card, placed in the warehouse as a picker on November 17. This may well be so, because by that date three pickers had been discharged only a few days

earlier. As to the remaining few the record is too confused to justify useless discussion.

On the basis of the unit thus far determined, therefore, it would appear there were at least 59 employees in the unit at the time of demand and refusal. The General Counsel placed into evidence 27 authorization cards signed by some of these persons, five dated November 17 and 21 dated November 13. And one, by Ritchie - is dated November 18. Eighteen of the 27 persons testified and personally authenticated the signatures on the cards. Seven cards - those of Wayne, Grass, Haynes, Rehman, Simkins, Hill and Smith - were authenticated by witnesses who actually saw the employee sign the card. And two - those of Evans and Hurlbut - were offered into evidence by Spang, who said the two women personally returned them to him with their signatures written 30 minutes after he had handed them to the employees. I find all 27 of the cards valid and reliable for the purpose of testing majority in this proceeding.

Arguments are made in defense that some of these cards are not valid now. Rehman, a striker who returned to work by himself, unassociated with the rest, said he signed his card on the 17th, and not on the 14th. Another, Grass, said he signed "before the picketing started" (this had to be by the 17th). The card is dated the 17th! Were I to detail the testimony of these witnesses it would clearly show why their attempts to retract their earlier authorizations of the Union must be rejected.

One man, Smith, testified he was forced by threat of a physical violence to sign his card. He said Masi, and another unidentified employee, followed his car late one night after he left the plant, forced him to the curb, told him the same would happen to him as had happened to his brother earlier, and that he must "put a specific date" on the card - the 13th of November. Smith said he did that while the threatening employee "was standing next to my car looking down." Masi denied the entire incident, and I believe him. If in fact the intimidating person were watching so closely to be sure

Smith put the desired date on the card, he would hardly have overlooked the fact Smith mistakenly wrote the 10th (October) in place of the 11th (November) on the card.

It thus appears that at best the Union was authorized by 27 out of the 59 employees, and therefore had not been authorized by a majority in the bargaining unit at the time of demand and refusal.

Did the Unlawfully Discharged Employees Lose Reinstatement Rights?

Between the day of the mass discharge on November 14 - starting on about the 18th and continuing through as late as November 28 - the Respondent wrote a great number of letters to the homes of both dischargees and strikers. Appraisal of all the testimony and documents about this continuing campaign of letter writing shows convincingly that it was aimed at confusing the entire group, creating uncertainties in their minds as to what the Company intended to do about them, and in total disrupting the cohesive feeling that caused the union movement to start in the first place and to progress into the sympathetic strike action in protest against the illegal discharges. Among these letters there was one sent to each of the four warehousemen - Seppy, Spang, Reamer and McGettigan - bearing date November 24, and saying, among other things, "Your suspension is hereby rescinded," the "action" would be removed from their "personnel file," and that they were invited to return to work no later than 8 a.m. on November 28. But with both the Andersons testifying so clearly how the men had been discharged because of the most offensive misbehavior possible on the job, the Company's statements later that only "suspensions" were involved shows immediately an absolute dishonesty in the writing of the letters, and a picture of intended deception begins to emerge. Removal of an entry from a man's personnel file suggests clearing his record of disciplinary notices. But the men in fact having been told they were fired for lack of work, or lack of money, what

were they to think when later told there had been something wrong in their conduct?

Two of the discharged women - Hurlbut and Andrews - were sent written messages on November 28, saying now there was work available for them and they should return by 9 a.m. on December 1. November 28 was a Friday, the women had to have babysitters before they could go to work, and December 1 was Monday. On the face of the thing these were hardly what the Board deems proper offers of reinstatement to employees who have been illegally discharged. While the Respondent asserts it sent like messages to the two other discharged women - Evans and Hittner - it produced no evidence to prove what messages it did send.

None of these eight ever appeared at the plant before December 4, when the strikers also returned to work. The Respondent now argues that because they failed to make timely offer of return - the four by early morning on November 28 and the women (only two of whom are shown to have received any communication) by December 1, all eight forfeited any right to reinstatement and all claims for backpay, even assuming they were victims of unfair labor practices. On the total record I find no merit in this contention.

Apace with its letters to six dischargees, the Respondent was sending multiple letters to many of the strikers. In evidence there are copies of letters sent to nine of these, also bearing date November 24. In each of them the man was told his "suspension" letters of November 18 and of November 20 were being rescinded, and that they would be permitted to return to work by 8 a.m. on November 28. Entirely apart from the fact that a letter from an employer to a striker that he has permission to abandon the strike by a day certainly carries very confusing and coercive implications, this means that the Company did in fact write separate letters to at least nine strikers, each time removing him from

the payroll for being engaged in a strike. There are other letters, also received in evidence, sent to three additional strikers - Masi, McIntosh and Ritchie. Masi was told on November 20 he was suspended only while he refused to work; McIntosh was told the same thing on November 18; and Ritchie, after a November 18 letter saying he was suspended, was told, by separate letter on November 20, that his suspension applied only while he refused to work and while he could be replaced.[5]

With letters reflecting such shifting and conflicting positions on the part of the Employer, the strikers, as well as the dischargees, of necessity were placed in the impossible position of not being sure what the Respondent was up to. It was to be expected, therefore, that Yeoman, looking after the strike on behalf of the Union, and believing the Company was thinking of restoring normalcy to the work operation and maybe resolving all differences without further economic conflict, would talk with Berman, the manager, to inquire was it the intention of the Company to take everbody back to work. He did that, and, as he testified quite credibly, on December 1 asked Berman why had some employees not received letters, was it the intention of the Respondent to take "everybody" back, and Berman said yes. But when, on December 4, the employees did try to go to work and were refused admission, Yeoman asked Berman why this was happening, and, still according to his testimony, Berman said: "I can only do what my lawyers told me and they told me that we're not to allow the people

5. An amendment to the complaint calls all of these suspensions violations of Section 8(a)(3) of the Act, and in a technical sense they were. But nothing of significance would be added to the case were such precise findings made, because, as already explained, the strikers never ceased withholding their services of their own free will, but simply continued their strike. But it is true the letters were at least violations of Section 8(a)(1) - restraint and coercion upon employees engaged in perfectly protected union and concerted activity. I find that each of the letters telling a striker he was suspended from work was a separate violation of Section 8(a)(1).

to return to work because they didn't return on the date the letter said they should of." Yeoman even testified he spoke to the Company lawyer that day, who told him "They didn't show up on the day that was on the letter and therefore we're not taking them back." Yeoman denied any statement by the lawyer about strikers wanting supervisors to be reinstated.

Berman gave differing versions of his talks with Yeoman those critical days. He said that on December 2, when Yeoman said some "people" had not received letters, he responded "everbody was supposed to get it," but "with the exception of people called supervisors." Berman continued that when Yeoman started talking about people coming back to work, he told the union agent the lawyer had advised the "people" had not returned on time, had been replaced, and that he, Berman, would do only what "I'm legally obligated to do." Berman continued that later that day he called the lawyer, and overheard the conversation between Yeoman and the lawyer, and that the lawyer said "there are some supervisors, and there may be some problems with that."

Still according to the manager, Yeoman was back on December 3, to say "the picket lines are down" and the people would be back tomorrow, and that he answered "I am only going to do what I am legally obligated to do at this point." And on the 4th, when the Company refused to take anybody back, if Berman is to be believed, he told Yeoman simply that there was no available work for them.

But however vacillating the barrage of letters may have been, most of them did end with clear invitations to come to work. How did all this talk about "legal obligations" become a part of the Respondent's intentions if the letters were meant to have any honest meaning? Berman did not say, on December 4, even according to his story, that it was the "all or none" attitude that foreclosed reinstatement of anyone. Maybe some had been replaced, but there is no evidence *all*

had been replaced. His changing statement even those days show once again that the Company never really intended the clear language of its letters. I do not believe Berman where his testimony conflicts with that of Yeoman.[6]

What this total picture proves to me is that the Respondent never intended to reinstate any of the eight persons who had been illegally discharged, whatever its purpose may have been in sending invitations to the strikers. The dischargees stood in a different posture than did the strikers; they were out on the sidewalk against their will. To them the Respondent owed clear and unequivocal reinstatement, and backpay as well. If some of them became confused after seeing so many identical recall letters to the sympathy strikers, and formed the impression the latter group was going back to work, it was the Respondent who deliberately planted the idea in their minds. The technique also appears clearly, considering all the evidence, as a device calculated to create uncertainty in them, to scatter their brains so that in some fashion a colorable defense might later be made to the continuing liability for backpay damages. In such a situation, no single phrase out of a single letter can be taken out of context, and given exclusively determinative weight. In the turmoil thus engendered by the successive letters, it can not be said the Company truly offered to undo the injury it had caused. If Berman, or the Andersons, meant at all to restore the status quo - with respect to the discharged eight, all they had to do on the morning of December 4 was come out to the sidewalk and tell each of the individually illegally discharged persons that

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6. During the first day of the hearing the lawyer, who spoke to Yeoman on the telephone, tried to draw on cross-examination of the witness an admission that he was told by the lawyer that supervisors were involved; he failed. On the 7th day of the hearing the same lawyer took the stand as a Respondent witness. Shown what he then said was his contemporaneous office memorandum of the critical telephone conversation, and then asked what had the conversation been, he said he could not remember! I credit Yeoman, of course.

he, or she, would be put back to work then and there, and never mind what problems, legal or otherwise, might be created by the mass return of the collective strikers. Indeed, Berman, according to his story, only spoke that day of there being no work for anyone. But an employee discharged in violation of Section 8(a)(3) of this Act is entitled to reinstatement no matter how many persons were later given his job.

There was no true offer of reinstatement to the discharged employees in this case; there was no refusal by any of them to accept coherent offers of reinstatement; and the Respondent must be ordered to reinstate them unequivocally now.

The Remedy

Having found that the Respondent committed a variety of unfair labor practices, it must be ordered to cease and desist from such practices and to take necessary corrective measures to undo the effects of the misconduct to the extent possible. It must stop threatening to discharge people, it must stop telling people their fellow workers are being sent home only because of the union activities, it must stop promising raises as inducement to prevent union activities, and, of course, it must stop such multiple outright discharge of prounion employees in the plant. Also, in keeping with established practice, the Company must offer reinstatement to all eight of the persons who were illegally discharged, and make them whole for any loss of earnings incurred inconsequence.

I think the Charging Party is right in contending that the unfair labor practices to which this Respondent resorted to kill off the union campaign with finality - violent and outright discharge of seven persons within hours of the birth of the union campaign - were "so outrageous and pervasive" that an essential element of the remedial order must include an affirmative order directing the Respondent to bargain with the Union now. I think the Respondent's reaction to the union campaign, and its total conduct as revealed

by the events of the time and the behavior of its representatives at this hearing, precludes any rational expectation that a fair election among the employees can possibly take place in the foreseeable future. It is now an accepted legal principle, as expressed by the Supreme Court in *N.L.R.B.* v. *Gissel Packing Co., supra,* that when the unfair labor practices committed by an employer are of "such a nature their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had," an affirmative bargaining order is appropriate "without need of inquiry into the majority status." Accord, also *N.L.R.B.* v. *Logan Packing Co.,* 386 F. 2nd, 562 (C.A. 4), enforcing 152 NLRB 421.

I am convinced that anything short of a bargaining order here assures the Respondent of continued enjoyment of the fruits of its extreme unfair labor practices. Extraordinary cases justify extraordinary remedies. And as I read the Board's recent decision in *Steel-Fab, Inc.,* 212 NLRB 363, where the unfair labor practices found are so pervasive and outrageous as to demand a bargaining order, violation or no violation of Section 8(a)(5) is irrelevant. If the refusal to bargain unfair labor practice is irrelevant there, logically, it is irrelevant here.

IV. The Effect of the Unfair Labor Practices upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate, and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. By discharging Mark Spang, Charles Seppy, Kerrie Hurlbut, Lois Andrews, Belinda Evans, Daniel McGettigan,

Robert Reamer and Gloria Hittner, for engaging in union activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

2. By the foregoing conduct, by threatening to discharge employees in order to prevent them from engaging in union activities, by telling employees their fellow workers were being discharged in punishment for their union activities, by promising raises to induce employees to abandon their union activities, and by telling striking employees they were being suspended for engaging in protected concerted activities, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

ORDER

The Respondent, Haddon House Food Products, Inc., and Flavor Delight, Inc., Medford, New Jersey, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or in any other manner discriminating against its employees because of their union activities.

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7. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Threatening to discharge employees in order to prevent them from engaging in union activities, telling employees their fellow workers were being discharged as punishment for union activities, promising raises to employees to induce them to refrain from union activities, or telling striking employees they are being suspended for engaging in protected concerted activity.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join or assist Teamsters Local 115, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Mark Spang, Charles Seppy, Kerrie Hurlbut, Lois Andrews, Belinda Evans, Daniel McGettigan, Robert Reamer and Gloria Hittner immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make all of the foregoing employees whole for any loss of pay or any benefits they may have suffered by reason of the Respondent's discrimination against all of them.

(c) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, person-

nel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Upon demand, recognize Teamsters Local 115, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of all employees included in agreed upon appropriate unit, and bargain with that union in good faith, and if an understanding is reached, embody it in a sign agreement.

(e) Post at its place of business in Medford, New Jersey, copies of the notice attached hereto and marked "Appendix."[8] Copies of said notice on forms provided by the Regional Director for Region 4, after being duly signed by its representatives, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director for Region 4, in writing, within 20 days from the date of the receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated at Washington, D.C.

Thomas A. Ricci
Administrative Law Judge

8. In the event that the Board's Order is enforced by a Judgement of a United States Court of Appeals the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGEMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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ALEXANDER L. STEVAS,
CLERK

No. 80-1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEAMSTERS LOCAL UNION NO. 115,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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a/w International Brotherhood of Teamsters,
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Petitioner,

v.

National Labor Relations Board,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM

On page 8 of the Petition, we indicated that the National Labor Relations Board had accepted the remand from the Third Circuit in *United Dairy Farmers Cooperative Ass'n v. N.L.R.B.*, 633 F.2d 1054 (1980). On August 14, 1981, the Board issued a Supplemental Decision and Order requiring the employer to bargain with the Union. The Supplemental Decision and Order is officially reported at 257 N.L.R.B. No. 129.

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TEAMSTERS LOCAL UNION NO. 115,
a/w International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, HADDON HOUSE
FOOD PRODUCTS, INC., FLAVOR DELIGHT, INC.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the National Labor Relations Board is authorized to issue a bargaining order to remedy an employer's "outrageous" and "pervasive" unfair labor practices which have prevented the union from attaining majority status.

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NATIONAL LABOR RELATIONS BOARD, HADDON HOUSE
FOOD PRODUCTS, INC., FLAVOR DELIGHT, INC.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Haddon House Food Products, Inc. and Flavor Delight, Inc., file this Brief in Opposition to Petitioner's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on January 26, 1981, which denied a petition to review an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 641 F.2d 984. [App. B1-B24]*

The decision and order of the National Labor Relations Board, dated June 12, 1979, is reported at 242 NLRB No. 180. [App. C1-C61].

JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1981. The Court of Appeals denied the Union's petition for rehearing and petition for rehearing *en banc* on February 28, 1981. The Petitioner's petition for writ of certiorari was served on Respondents on May 27, 1981. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

APPLICABLE STATUTORY PROVISIONS

Section 7 of the National Labor Relations Act [29 U.S.C. Section 157] (hereinafter referred to as "the Act") provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

*References to Petitioner's Appendix appear in brackets.

Section 8(a)(1) of the Act [29 U.S.C. Section 158(a)(1)] provides:

> It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Section 10(c) of the Act [29 U.S.C. Section 160(c)] provides, in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.

STATEMENT OF THE CASE

Respondent, Haddon House Food Products, Inc. (hereinafter referred to as the "Employer"), is a New Jersey corporation engaged in the wholesale distribution of food products. Ancillary aspects of the Respondent's business include the warehousing and delivery of its products to food stores, department stores, delicatessens and various other distributors of its products. Respondent, Flavor Delight, Inc. (hereinafter referred to as the "Employer"), is a New Jersey corporation engaged in the manufacture and packaging of a line of seasonings and spices which are marketed by Respondent Haddon House. Haddon House and Flavor Delight occupy adjoining premises in Medford, New Jersey.

The Petitioner, Teamsters Local Union No. 115 affiliated with the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "the Union"), began organizing the employees of the Employer on November 13, 1975.[1] Several of the Employer's employees signed union authorization cards on the 13th and on November 17, Teamster business agent Joseph Yeoman presented himself at the Employer's offices demanding that the Employer recognize and bargain with the Union.

Prior to the Union's demand for recognition, the Employer discharged and laid-off a number of employees.

An Administrative Law Judge (hereinafter referred to as the "ALJ") of the National Labor Relations Board (hereinafter referred to as the "Board") found that the Employer was guilty of numerous unfair labor practices stemming from the discharges and layoff referred to above. Although the ALJ found that the Union had never obtained authorization cards from a majority of the employees in the petitioned-for bargaining unit, he recommended that the Board issue a bargaining order based upon his finding that a fair election could not be held among the Employer's employees in the foreseeable future. The Board accepted the ALJ's findings of unfair labor practices, but declined to issue the recommended bargaining order. However, in addition to its standard remedies, the Board ordered a variety of alternative remedies, which included the following extraordinary mandates:

> 1. Ordering the Employer to grant the Union and its representatives, upon request, reasonable access to company bulletin boards and all places where notices to employees are customarily posted for a period of two (2) years;
>
> 2. Ordering the Employer to grant the Union, upon request, reasonable access to its plant in non-

1. All dates herein refer to 1975, unless otherwise indicated.

work areas during employees' non-work time for a period of two (2) years;

3. Ordering the Employer to give notice of, and equal time and facilities for the Union to respond to, any address made by the Employer to its employees on a question of Union representation for a period of two (2) years;

4. Ordering the Employer to afford the Union the right to deliver a 30-minute speech to employees on working time prior to any Board election which may be scheduled in which the Union is a participant for a period of two (2) years.

The Union and the Employer each petitioned for review of the Board's order to the United States Court of Appeals for the District of Columbia Circuit and the Board cross-petitioned for enforcement. The Court generally upheld the Board's findings, specifically affirming the Board's decision not to issue a bargaining order.

The United States District of Columbia Circuit Court of Appeals, on February 28, 1981, in a *per curiam* order, denied the Union's petition for a rehearing and petition for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

It is well settled that the Board has broad discretion to fashion remedies in unfair labor practice cases. Historically, the Board has never issued a bargaining order absent a showing that at some time the union enjoyed the support of a majority of the employees in the unit the union sought to represent. Consistent with its past practice, the Board was unwilling to order such relief in this case. It is important to note that this Court has considered the question presented by the Union once before and indicated that the Board's discretionary power to fashion remedies encompasses a minority-

based bargaining order. *NLRB v. Gissel Packing Company*, 395 U.S. 575 (1969). Apparently, the Board has not found it appropriate to circumvent the fundamental principle of majority rule. The Appellate Court in the instant case concluded in its decision below:

> . . . For a government body to bypass the employees altogether, and impose a bargaining representative merely on the basis of its own assessment of the employees' needs, would pose a serious threat to employee freedom of choice. [App. B11]

Additionally, the Appellate Court found that

> The Board has sufficiently articulated its conclusion that, whether or not this remedy may be justified in some hypothetical situation, the majority of the Board agrees it is *not appropriate* in this case. (Emphasis supplied) [App. B11]

Contrary to the Union's assertion, the decision of the Court of Appeals for the District of Columbia Circuit is not in conflict with the decision of the Court of Appeals for the Third Circuit styled *United Dairy Farmers Cooperative Association v. NLRB*, 633 F.2d 1054 (3rd Cir. 1980). In *United Dairy Farmers*, a case involving a systematic pattern of premediated unfair labor practices, the Court remanded the case to the Board to determine if the unfair labor practices committed were, in fact, so "outrageous" and "pervasive" that a bargaining order should issue in the absence of a card majority. In the instant case, the District of Columbia Circuit did not hold that the Board lacked the authority to issue a minority-based bargaining order as the Union contends. The Court agreed with the Board that although this remedy may be appropriate in some instances, it would not be appropriate in this case. Since the appellate decisions in both the instant matter and *United Dairy Farmers* are not in conflict, the issue the Union puts before this Court cannot be subject to further review.

United Dairy Farmers, as noted, involved extensive unfair labor practices which were viewed against a background of similar violations in two previous anti-union campaigns waged by the employer. In the instant case, the Employer found itself in violation of the Act for the first time. Under the most stringent examination of the factual holdings determined herein, the issuance of a minority-based bargaining order would be clearly inappropriate.

The Union cites an extensive list of court decisions and legal articles written by a diversified range of commentators who have purportedly accepted the Third Circuit's analysis of *Gissel* in *United Dairy Farmers*. However, each commentator and each court decision cited concur that the Board is empowered to issue a bargaining order *only* when there is clear evidence that a majority of employees in the petitioned-for bargaining unit desire union representation or the facts indicate that a free and fair election cannot be held in the future. *See*, Comment, United Dairy Farmers Cooperative Association: *NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority*. 80 Columbia Law Review 840 (1980). All the cited authorities agree that because a bargaining order is "strong medicine" and because there exists reasonable doubts as to its efficacy and propriety in situations where the employer's pervasive unfair labor practices impede the union from acquiring a majority in the appropriate bargaining unit, its implementation should be limited to extraordinary cases. *See*, Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union has Never Attained a Majority*, 29 Labor Law Journal 631 (1978). The facts in the instant case do not approach such a standard.

Moreover, the Board decided in the instant case that the imposition of a bargaining order would not effectuate the policies of the Act because the union did not demonstrate that it had ever held the support of a majority of

the Employer's employees. As this Court has stated, "It is for the Board and not the courts . . . to make [the] determination whether to issue a bargaining order." *NLRB v. Gissel Packing Company, supra*, 395 U.S. at 612, n. 32. *See, NLRB v. International Meat Specialties, Inc.*, 433 F.2d 870, 872 (2nd Cir. 1970) (the Board has "almost total discretion to determine when a bargaining order is appropriate").

The Board's refusal to issue a bargaining order in this instance, a case where the majority of employees have never indicated a preference for a union, is consistent with the policies of the Act, and "well within the range of respect traditionally to be accorded by [courts] to the Board's determinations." *Food Store Employees, Local No. 347 v. NLRB*, 476 F.2d 546, 550 (D.C. Cir. 1973), *reversed on other grounds*, 417 U.S. 1 (1974).

This Court should deny the Union's petition because of the great deference granted to the Board in fashioning appropriate remedies. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). The Act's fundamental policy is to effectuate majority rule in the selection of a collective bargaining representative. Section 7 of the Act guarantees employees the right to engage in or refrain from engaging in collective bargaining. In the instant case, a majority of the employees have never, at any time, indicated that they desire union representation. To the contrary, it is quite possible that a majority of the present employee complement freely oppose unionization. In this respect, employee turnover and the passage of time since the commission of the Employer's unfair labor practice are factors which the Board should consider in fashioning an appropriate remedy. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 214 (2nd Cir. 1980). In this regard, it should be noted that the Board's order was issued four years after the initial unfair labor practice charge was filed by the Union.

To date, the Employer has not been charged with any additional violations of the Act. In these circumstances, it seems eminently reasonable that the Board, exercising its responsibility under Section 10(c) of the Act, declined to trample upon the principle of majority rule found in Section 7. In the past, this Court has given great deference to the majority-rule principle. In *ILGWU [Bernhard-Altman] v. NLRB*, 366 U.S. 731 (1961), this Court found a violation of Section 8(a)(2) of the Act when the employer, in good faith, granted recognition to a minority union. This Court found that allowing such recognition would frustrate the employees' freedom of choice and destroy majority rule in the selection of a representative. In light of that decision, and the principle of majority rule which it affirms, it would indeed be an anomaly for this Court to grant a petition which could result in undermining the basic principle of majority rule which is the central thrust of the Act.

In addition, certiorari is inappropriate in this case because there is no conflict between the Third Circuit and the District of Columbia Circuit on the question presented by the Union.

CONCLUSION

For the reasons above stated, we respectfully urge that Petitioner's Writ of Certiorari be denied.

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OCTOBER TERM, 1980

TEAMSTERS LOCAL UNION NO. 115, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals acted reasonably in declining to remand the case to the Board for reconsideration of the need for imposition of a bargaining order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-24) is reported at 641 F. 2d 984. The decision and order of the National Labor Relations Board (Pet. App. C-1 to C-61) is reported at 242 N.L.R.B. 1057.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981. A petition for rehearing was denied on February 28, 1981 (Pet. App. A-1 to A-2). The petition for a writ of certiorari was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), is set forth in pertinent part at page 2 of the petition. Also relevant is Section 9(a) of the Act, 29 U.S.C. 159(a), which provides in relevant part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

STATEMENT

1. The Board found that Haddon House Food Products, Inc. and Flavor Delight, Inc. (the "Company") violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging eight employees on account of their activities on behalf of petitioner Union and by refusing to reinstate employees who went on strike to protest the Company's unfair labor practices following the employees' unconditional offer to return to work. The Board further found that the Company violated Section 8(a)(1) of the Act by threatening to discharge employees because of their union activities, by telling some employees that other employees had been discharged because of their union activities, and by promising benefits to employees to discourage such activities (Pet. App. C-1 to C-5, C-58 to C-59).

The administrative law judge (ALJ) had recommended a conventional cease and desist, reinstatement, and backpay order (Pet. App. C-59 to C-60). In addition, because the Company had committed "outrageous" and "pervasive" unfair labor practices that precluded the holding of a fair election, and notwithstanding the fact that the Union never had been designated by a majority of the employees as their

collective bargaining representative,[1] the ALJ recommended that the Company be required to bargain with the Union as the exclusive representative of all employees in the bargaining unit (Pet. App. C-57 to C-58, C-61).

The Board, with Chairman Fanning and Member Jenkins dissenting, declined to issue the recommended bargaining order.[2] Instead, in addition to the conventional remedies recommended by the ALJ, the Board imposed several extraordinary remedies "designed to dissipate as much as possible the lingering atmosphere of fear created by [the Company's] unlawful conduct and to ensure that if the question of union representation is placed before employees in the future they will be able to voice a free choice" (Pet. App. C-6). These additional remedies required the Company to: (a) mail notices signed by the Company's owner and manager setting forth the conduct from which

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[1]The ALJ found (Pet. App. C-52) that "at best" the Union had obtained valid authorization cards from "27 out of the 59 employees" in the bargaining unit.

[2]Members Murphy, Truesdale, and Penello, who comprised the Board majority, declined to issue a bargaining order for the reasons stated in their majority and concurring opinions in *United Dairy Farmers Cooperative Ass'n*, 242 N.L.R.B. 1026 (1979), remanded, 633 F. 2d 1054 (3d Cir. 1980) (Pet. App. C-6). In that case, Members Murphy and Truesdale acknowledged (242 N.L.R.B. at 1027; footnote omitted) that "the Board's remedial authority under Section 10(c) of the Act may well encompass the authority to issue a bargaining order in the absence of a prior showing of majority support" (242 N.L.R.B. at 1027). Nonetheless, in view of the "substantial risk of imposing a union on nonconsenting employees," they declined, in the exercise of their discretion, to issue such a bargaining order where, as in that case, other remedies could be devised that would "tend to restore an atmosphere in which employees are given a meaningful opportunity to exercise their Section 7 rights in an election" (*id.* at 1028). Member Penello was of the view that the Board lacked *authority* to issue a bargaining order in the absence of a showing of majority support for the Union, on the ground that such an order would be inconsistent with the principle of majority rule reflected in Section 9(a) of the Act, 29 U.S.C. 159(a) (242 N.L.R.B. at 1038-1043).

the Company will refrain in the future to all employees, including those presently employed and those who were on the Company's payroll at the time the unfair labor practices were committed; (b) publish copies of the notice in appropriate Company publications and in local newspapers of general circulation twice a week for four weeks; (c) have its owner and manager read the notice to the assembled employees in the presence of a Board agent; (d) upon request, grant the Union and its representatives reasonable access to Company bulletin boards and all places where notices to employees are customarily posted for two years; (e) upon request, grant the Union reasonable access to employees on Company premises in nonwork areas and on nonwork time for two years (or until a fair election has been certified); (f) upon request, provide the Union with the names and addresses of its current employees for one year; (g) afford the Union notice of, and equal time and facilities for it to respond to, Company speeches to its employees concerning union representation for two years (or until a fair election has been certified); and (h) permit the Union to deliver a 30-minute speech to employees on Company time prior to any Board election held within two years (*id.* at C-7 to C-8, C-11 to C-13).

2. On petitions for review by both the Company and the Union and a cross-application for enforcement by the Board, the court of appeals enforced the Board's order in all respects, except that it refused to require the Company owner and manager personally to read the notice described in item (c) above (Pet. App. B-13 to B-24).[3] The court rejected the Union's contention that, because Board Member Penello's decisive vote was based on his view that the Board lacked statutory authority to impose a bargaining order in

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[3]The court modified the order to require the Company to " 'have a responsible officer of [the Company] read' the Board notice" (Pet. App. B-24).

the absence of a showing of prior majority support for the Union (see note 2, *supra*), the court was required to decide whether, in fact, the Board possessed such authority since, if it did, a remand would be necessary to ascertain Member Penello's views concerning whether a bargaining order was appropriate in this case. Rather, the court held (Pet. App. B-11) that "the concerns that he has already expressed" concerning impairment of the principle of majority rule (see note 2, *supra*) indicate that Member Penello would join Members Murphy and Truesdale in concluding that, even if a bargaining order in favor of a minority union "may be justified in some hypothetical situation, * * * it is not appropriate in this case."

ARGUMENT

The question that the Union seeks to raise—whether the Board has statutory authority to issue a bargaining order to remedy an employer's "outrageous" and "pervasive" unfair labor practices that have prevented a union from attaining majority status—is not presented by this case.[4] As shown at pages 4-5 above, the court below found it unnecessary to decide that issue because, according to its reading of the Board's opinions, a majority of the Board had indicated that, even if it had such authority, the issuance of a bargaining order in this case would be inappropriate.[5] Accordingly,

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[4]In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the Court held that a remedial bargaining order was justified where a union had at some point obtained authorization cards from a majority of the employees in the appropriate unit and the employer had committed unfair labor practices that tended "to undermine majority strength and impede the election processes" (*id.* at 614). The Court "left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices" (*id.* at 613).

[5]Because the court of appeals did not reach the issue, there is no conflict between the decision below and the Third Circuit's holding in *United Dairy Farmers Cooperative Ass'n* v. *NLRB*, 633 F. 2d 1054

the only question actually presented is whether the court below was correct in concluding that Member Penello, who believed that the Board lacked statutory authority to issue a bargaining order in favor of a minority union, would have declined to issue a bargaining order in this case if it were determined that the Board in fact had such authority. This issue, which turns on an interpretation of a particular Board decision, does not warrant review by this Court.[6] Moreover, since Member Penello voted to deny a bargaining order for the same basic reason that Members Murphy and Truesdale did—namely, to avoid trenching on the principle of majority rule (see note 2, *supra*)—the court of appeals did not act unreasonably in declining to decide the question whether the Board has authority to issue a bargaining order in favor of a minority union "merely in order to remand this case to the Board so that Member Penello can restate in slightly different terms the concerns that he has already expressed" (Pet. App. B-11).

(1980), that the Board has authority to issue a bargaining order to remedy "outrageous" and "pervasive" unfair labor practices that prevented a union from acquiring majority status.

[6]Indeed, as the Union notes (Pet. 9 n.2), the members who comprised the majority in this case are no longer on the Board.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

Petitioner's supplemental memorandum calls the Court's attention to the Board's supplemental decision and order in *United Dairy Farmers Cooperative Association*, 257 N.L.R.B. No. 129 (Aug. 14, 1981). In that case, a three-member panel of the Board, pursuant to the Third Circuit's remand in *United Dairy Farmers Cooperative Association* v. *NLRB*, 633 F. 2d 1054 (1980), held that a bargaining order was appropriate to remedy "outrageous" and "pervasive" employer unfair labor practices that had precluded the Union from securing authorization cards from a majority of the employees.

That decision by the Board affords no additional basis for granting the petition in this case. First, as explained in our brief in opposition, filed June 25, 1981 (at pages 5-6), the court below, unlike the Third Circuit in *United Dairy*,

found it unnecessary to decide whether the Board has the authority to issue a nonmajority bargaining order. As the District of Columbia Circuit read the Board's opinions in this case, a majority of the Board indicated that, even if it possessed such authority, the issuance of a bargaining order in the present case would be inappropriate.

Second, the three-member panel that issued the nonmajority bargaining order in *United Dairy* consisted of then Chairman Fanning and Member Jenkins, the two dissenters in the present case, and Member Zimmerman, who recognized "the Third Circuit's decision as binding upon the Board for the purpose of deciding this case" and therefore found it "unnecessary to determine whether the Board has such authority" (257 N.L.R.B. No. 129 at 4 n.8). In these circumstances, and because two new members subsequently have been added to the Board (Chairman Van de Water and Member Hunter), the holding in *United Dairy* should be viewed as limited to the circumstances of that particular case, rather than as a definitive statement of the Board's position on its authority to issue nonmajority bargaining orders.

For these reasons and those stated in our brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY MEMORANDUM

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National Labor Relations Board,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY MEMORANDUM

1. The Board properly concedes that the District of Columbia Circuit ignored Member Penello's conclusion that the Board lacked statutory authority to impose a remedial non-majority bargaining order. As the Board acknowledges, the circuit court decision is based upon its assumption that Member Penello "*would have* declined to issue a bargaining order in this case if it were determined that the Board in fact had such authority." (Br., p. 6) (emphasis supplied). But, as this Court has recently reiterated, an appellate court may not enforce a Board order by adopting "an

analysis different from that espoused by the Board." *First National Maintenance Corp. v. NLRB*, ____ U.S. ____, n. 6 (1981). The District of Columbia Circuit cannot speculate concerning Member Penello's application of new law to the individual facts of this case.

2. The Company concedes that "the Board's discretionary power to fashion remedies encompasses a minority-based bargaining order." (Br., pp. 5 - 6). It argues, however, that the facts presented do not warrant such relief, a position not asserted by either the court of appeals or the Board. Member Penello, whose vote was decisive, did not believe the facts were even relevant, and the court of appeals did not analyze the facts in this context. Had the Board found the requested relief inappropriate on the facts presented, the court might have deferred to the Board's exercise of discretion. But Member Penello did not exercise his discretion and neither did the Board. The court of appeals, therefore, could not uphold the Board's exercise of discretion.

CONCLUSION

For the reasons stated above and in our main brief, we respectfully urge the Court to grant a Writ of Certiorari in this case.

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